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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND,

In 1815, 1816, 1817, 1818 & 1819.

BY THOMAS HARRIS,
Clerk of the Court of Appeals,
and
REVERDY JOHNSON,
Attorney at Law.

VOLUME IV.

ANNAPOLIS:
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ERRATA.

PAGE.	LINE.	
17	17	Before *return* insert *not*.
54	26	Of the marginal note. After *was* insert *not*.
83	32	For *papers* read *paper*.
91	36	For *for* read *of*, and for *of* read *for*.
92	13	Erase *time*.
	23	After 74 erase 5, and insert 5 after S. C.
94	9	For *run* read *ruin*.
98	11	Erase the comma after *Maryland*, and insert it after *citizens*.
100	2	For *It is* read *Is it*.
106	13	For *process* read *proof*.
111	25	After *fine* insert *and*.
147	11	For *county court* read *commissary general*.
164	36	For *appellees* read *appellants*.
170	44	For 22,000 read 22,500.
222	42	For *grantee* read *grantor*.
279	34	After *conditional* insert *one*.
	37	For *valued* read *varied*.
288	37	Of the marginal note. For 1 read 11.
323	11	For 1826 read 1806.
350	2	For *was* read *were*.
351	17	Of the marginal note. For *H* read *T C*.
361	32	For *than* read *that*.
391	3	After *wainscot* insert a comma.
430		Correct the number of the following page.
435	28	For *tenant* read *tenement*.
444		Correct the number of the following page.
451	45	After *notice* insert, except that of *Heath's Range*, the first part, surveyed for *James Heath* on the 31st of August 1704, lying "between the heads of *Sassafras* and *Bohemia* rivers, beginning at a marked black oak standing at the end of the N E line of *Painter's Rest*, resurveyed for *Nicholas Painter* December 17, 1678, and running thence with *Painter's* line W N W 435 perches, thence along and with *Painter's* last line S 36° W 210 perches, to the head of the lands surveyed from the river side, then N W along and with the heads of the said lands 60 perches to," &c.
475	31	For the first *to* read *by*
487	19	For *liquidation* read *liquidators*.
506	17	After *did* insert *not*.
507	1	Of the second marginal note—For *this* read *the*.
528	5	After *That* erase *the*.
544	22	After *Court*, what follows constitutes a distinct paragraph, and forms no part of the remarks of the Chancellor.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. Jeremiah Townley Chase, Chief Judge.
Hon. John Buchanan, Judge.
Hon. Joseph Hopper Nicholson, do.
Hon. Richard Tilghman Earle, do.
Hon. John Johnson, do.
Hon. William Bond Martin, do.
Hon. Walter Dorsey, do.(a)

OF THE COURT OF CHANCERY.

Hon. William Kilty, Chancellor.

OF THE COUNTY COURTS.

First judicial district—*Saint Mary's, Charles* and *Prince George's* Counties.
Hon. John Johnson, Chief Judge.
Hon. Edmund Key, Associate Judge.
Hon. John Rousby Plater, do.

Second judicial district—*Cecil, Kent, Queen Anne's* and *Talbot* Counties.
Hon. Richard Tilghman Earle, Chief Judge.
Hon. Lemuel Purnell, Associate Judge.
Hon. Edward Worrell, do.

Third judicial district—*Calvert, Anne Arundel* and *Montgomery* Counties.
Hon. Jeremiah Townley Chase, Chief Judge.
Hon. Richard Hall Harwood, Associate Judge.
Hon. Richard Ridgely, do.

Fourth judicial district—*Caroline, Dorchester, Somerset* and *Worcester* Counties.
Hon. William Bond Martin, Chief Judge.
Hon. James B. Robins, Associate Judge.
Hon. William Whittington, do.

Fifth judicial district—*Frederick, Washington* and *Allegany* Counties.
Hon. John Buchanan, Chief Judge.
Hon. William Claggett, Associate Judge.
Hon. Abraham Shriver, do.
Hon. Roger Nelson, do.(b)
Hon. Thomas Buchanan, do.(c)

Sixth judicial district—*Baltimore* and *Harford* Counties.
Hon. Joseph Hopper Nicholson, Chief Judge.
Hon. Zebulon Hollingsworth, Associate Judge.
Hon. Theodorick Bland, do.
Hon. Charles W. Hanson, do.(d)
Hon. Walter Dorsey, Chief Judge.(e)
Hon. William H. Ward, Associate Judge.(f)

(a) Appointed the 14th of March 1817, to fill the vacancy occasioned by the death of Judge *Nicholson*.
(b) Appointed the 7th of May 1810, to fill the vacancy occasioned by the death of Judge *Claggett*.
(c) Appointed the 5th of May, 1815 in the place of Judge *Nelson*, deceased.
(d) Appointed the 5th of February 1817, on the removal of Judge *Hollingsworth*.
(e) Appointed the 14th of March 1817, in the place of Ch. J. *Nicholson*, deceased.
(f) Appointed the 20th of January 1818, to fill the vacancy occasioned by the resignation of Judge *Bland*.

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(a) See *Errata* 451——45.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

COURT OF APPEALS, DECEMBER TERM, 1815.

1815. DECEMBER.

SHIELDS's Lessee vs. MILLER.

APPEAL from *Frederick* County Court. Ejectment for a tract of land called *Shields' Adventure*. Defence was taken on warrant, and plots were made.

At the trial in the county court at August term 1807, the plaintiff offered in evidence the plots, explanations, and table of courses, returned in the cause, by which it appeared, that among other tracts located on the plots, was *Carrollsburg*, stated to have been granted to *Charles*, *Daniel*, and *Mary Carroll*, on the 2d of September 1732. He also read in evidence a grant for *Shields' Adventure*, dated the 6th of November 1795, and several other grants, and then offered to read in evidence the grant of *Carrollsburg*, to *Charles*, *Mary*, and *Eleanor Carroll*, on the 8th of August 1735, and stated to have been surveyed on the 2d of September 1732. To the reading of this last grant the defendant objected, and prayed the opinion of the court, that it was no evidence, and that it should not be read to the jury. Which opinion the Court, [*Buchanan*, Ch. J. and *Clagett*, and *Shriver*, A. J.] gave, and refused to let the grant be read. The plaintiff excepted; and the ver-

A grant was located on the plots by the plaintiff in ejectment, as issued to C, D and M C, on the 2d *of September* 1732.—*Held*, that he might offer in evidence a grant for the same land to C, M and E C, on the 8*th of August* 1735

The plaintiff proved by a witness the time when M S was born. The defendant then proceeded to examine the same witness, in order to establish his location made on the plots of a tract of land called *C*, for which he took defence. The plaintiff then offered to ask the witness if he did not own or claim title to the tract of land called *P*, located by the defendant, in order to show that the witness was interested in having the defendant's location of *C* established—*Held*, that the plaintiff was at liberty to ask the question, for the purpose of showing the witness interested and incompetent to give evidence relative to the location of *C*.

The true location of a tract of land is a question of fact to be decided by the jury on the evidence, and it is their duty to find the location in such place where, from the evidence they shall be of opinion the lines thereof were originally run, unless they shall also find from the evidence, the party, insisting on the original location, prevented, by some agreement, by adverse possession, or by some other legal bar, from availing himself of such location

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dict and judgment being against him, he appealed to this court.

The cause was argued at June term 1811, before Polk, Nicholson, and Earle, J.

Martin, for the Appellant. It is admitted that the jury ought not to find contrary to what is by both parties agreed to be true, whether by their pleadings, or in any other manner. It is also admitted, that the plots, as far as relates to the claim of the plaintiff, and defence of the defendant, are a part of the *pleadings*. For the plaintiff declares, that the defendant wrongfully ejected him from such a tract or part of a tract of land, as is contained within the locations on the plots *of his claim*. And the defendant replies, that he admits to have ejected the plaintiff out of such lands as are included within *his defence*, and relies upon being able to prove that he was guilty of no impropriety in so doing—as to all else the locations are *evidence;* but it is admitted, that if both locate a tract alike, or, as happens in most cases, if one doth not counterlocate the locations of the other, it is an agreement that the locations are right. It is said that plots cannot be considered as introduced instead of the view, because six jurors might view, but twelve must see the plots. What are the plots but a *miniature representation, on paper*, of the property actually in dispute? There is represented the same grant, with its actual courses and boundaries, which you might examine on the view, by those courses and boundaries, and every object which could be necessary on the view to be examined by way of evidence, or for any other purpose, might be delineated on the plots. But as the plots are only used in evidence at the trial in court, after the jury are sworn, the plots, like all other evidence, must be offered to the whole twelve. It is admitted, that the plaintiff and defendant were both precluded from saying that there was not a tract called *Carrollsburg*, as delineated on the plot, granted to *Charles*, *Daniel*, and *Mary Carroll*, on the 2d of *September* 1732, beginning and running as laid down on the plots. But it is denied, that it was inconsistent with this admission to give evidence, that on the 8th of *August* 1735, a patent was issued to *Charles*, *Mary*, and *Eleanor Carroll*, for the same land, beginning at the same place; the one is perfectly consistent with the

other. Twenty patents may be granted for the same land, or twenty deeds for the conveyance of the same land. Nor is it improper for the jury to find such patent, it not being contradictory to what was admitted in pleading or in evidence. Nor is there any inconsistency between the *allegata* and *probata* in allowing the evidence proposed to be given. It was not proposed to rely upon any recital to prove the grant of 1735, but the grant was produced and offered to be read. The beginning of the patent offered in evidence may be similar to that located on the plot; yet no evidence that their location in the country are the same. If the beginning in the country is the same, their location must be, because the courses are the same which are located; and whether the beginning of this patent was in the country, at the same place, must have depended upon evidence to be given *after* the patent was read in evidence, and which could not be given in evidence before. The land contained in the grant being located, authorised the reading any grant or any deed, the lines of which were similar, and the beginning the same. This principle has been solemnly decided in a number of cases.

Key, *Shaaff*, *Taney* and *Brooke*, for the Appellee. The plots are the pleadings in the cause, and are to have all the strict construction of pleadings. It is a rule in pleading, that what is admitted by the parties in pleading shall be taken to be true, although the jury should find to the contrary. Here the plots being the pleadings in the cause, both parties have pleaded that a grant for *Carrollsburg* issued to *Charles*, *Daniel*, and *Mary Carroll*, on the 2d of September 1732. This then, being taken to be true under the rule above mentioned, the jury cannot find that the grant for the same tract called *Carrollsburg* issued on the 8th of August 1735, to *Charles*, *Mary*, and *Eleanor Carroll*, because such finding would be contrary to the admissions of the parties in pleading. And if the jury cannot be permitted to find the fact, it would be improper to allow any evidence of such fact to go to them. It is contended, on the other side, that the plots are not, for every purpose, to be considered as the pleadings, but are used by way of illustration, and substituted in the place of the *view*, in *England*. But the principles of law applicable to views in *England*, and plots in this country, are totally different.

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It is sufficient that six of the jury see the land, &c to be viewed. But it will scarcely be contended, that only six of the jurors need see the plots. It was held, in *Baltimore* county court, in the case of *Hughes vs. Howard*, 3 *Harr. & Johns.* 9, where both parties located from the same beginning, that such place must be taken to be the true beginning; and the jury having found a different beginning, the court set aside the verdict as being contrary to the admissions of the parties by the plots. In the same case it was determined by the same court, and this court, that the party, having given but one location of the plan of *Baltimore-town*, he could not offer in evidence a plan different in its location. In *Hammond vs. Norris*, 2 *Harr. & Johns.* 130, a similar principle was established. These, and other determinations, establish this doctrine, that the plots are to be considered as the pleadings, and to have the same effect; and are not to be considered as mere illustration, and a substitute for the view in *England*. If the defendant does not take defence co-extensive with the plaintiff's claim and pretensions, judgment by default is entered for all the lands for which the defence does not appear on the plots. Now, what is mere matter of illustration can never be a ground upon which a judgment by default can be entered. The *allegata* and *probata* must correspond. If the plaintiff declares on a lease of a certain date, and offers in evidence a lease of a different date, the evidence is inadmissible. *Scevage vs. Parker*, *Cro. Jac.* 647. If the plaintiff declares on a bond by defendant, he cannot offer in evidence a bond by defendant and another person, although such other person be dead. *Viner's Ab.* tit. *Evidence*, 65. If a plaintiff undertakes to set out a statute, and gives it a wrong date, it is fatal. *Plow.* 84. 1 *Com. Dig.* tit. *Action upon Statute*, (I) 330. It is contended, that it appears by the *recital* of the certificate that the land is the same. It is certain that without such recital there is no evidence of the land being the same. But this *recital* is no evidence in the cause. The recital of a deed, record, lease, &c. in another deed or record, is no evidence of such *recited* deed, &c. *except against the parties to it, or those claiming under it*, who are estopped to aver any thing contrary to their own deed, or the deed of the person under whom they make title. 4 *Com. Dig.* tit. *Evidence*, (B 5,) 93. The recital being rejected, as the defendant is not a party to it, and

does not claim under it, the patent is a naked grant, totally different in substance from that set out in the explanations; and there is no evidence in the cause to show that they are the same; for although the beginning, described in the patent offered in evidence, may be *similar* to the beginning of the land described on the plots, yet there is no evidence that they are the same in the country.

This Court *reversed* the judgment of the County Court, and awarded a *procedendo*.

Polk, J. dissented.

1. At the new trial had in the County Court at August term 1812. the plaintiff gave in evidence the plots and illustrations returned in the cause; and also grants of the following tracts of land, viz. *Carrollsburg*, *Carrick's Chance*, and *Shields' Adventure*, the last being the tract for the recovery of which this action is brought. And offered in evidence, that *Carrollsburg* is truly located on the said plots by him, with the allowance of one degree and one half degree for variation; and that *Carrick's Chance* and *Shields' Adventure*, are also truly located by him. He also gave in evidence the last will and testament of *William Shields*, the grantor of *Shields' Adventure*, dated the 30th of November 1789, whereby the testator directed, that as much of his personal estate, slaves included, as should be judged necessary to pay off all his legal debts and funeral expenses, and also to make out good right for the part of his land which was not patented or conveyed to him, be sold and turned into cash, and the money arising from such sale be applied by his executors to the above purpose twelve months after his decease, or as soon as it may be in their power to collect the money; also, that on his youngest daughter, *Margaret's*, arrival to the age of sixteen, he directed that then all his real and personal estate should be sold and turned into cash, and the money arising from such sale to be distributed and divided by his executors, whom he empowered and authorised to convey and make good rights to the purchasers of all his real and personal estate, amongst all his children, to wit: *John*, *James*, *Henry*, *William*, *Samuel*, *Agnes*, *David*, *Banner*, *Ebenezer* and *Margaret*. He constituted and appointed his sons, *John* and *James*, his executors.

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The will was proved the 9th of August 1797. And also the letters testamentary which were granted to *John Shields*, one of the executors named in the will, on the same day. And a deed from the said *John Shields* to *William Shields*, dated the 13th of December 1800, for a tract of land consisting of parts of *Carrollsburg*, *Shields' Adventure*, *Carolina*, *Carrick's Chance*, and *Shields' Delight*, containing 560½ acres and 26 poles, and described by courses and distances, &c. containing a proviso that the said *William Shields* should pay to the said *John Shields* certain sums for which he had given his bond, on, &c. And a deed from the last mentioned *William Shields* to the aforesaid *John Shields*, the lessor of the plaintiff, dated the 8th of January 1801, for the same lands as mentioned and expressed in the last above mentioned deed. The defendant then gave in evidence the patent of *Carrollsburg*, and his location thereof on the plots, with four degrees and a half for variation; and the grants of *Porter's First Addition*, dated the 29th of September 1764, and *Porter's Second Addition*, dated the 29th of September 1764, both granted to *William Porter*, and the defendant's locations of those two tracts on the said plots. The plaintiff then called upon a certain *Henry Williams* as a witness, and gave in evidence by him, that *Margaret Shields*, mentioned in the said will, was born on the 2d of October 1783. He examined him to no other point. The plaintiff then gave the witness over to the defendant for cross examination. The defendant then proceeded to examine the witness, in order to establish his location of *Carrollsburg*, at which time the plaintiff offered to ask the witness, whether he, the witness, did not own or claim title to the tracts of land called *Porter's First Addition*, and *Porter's Second Addition*, located by the defendant, in order to show that the witness was interested in having the location of *Carrollsburg* established. But the Court, [*Buchanan* Ch. J. and *Shriver* A. J.] were of opinion, and so decided, that the plaintiff was not at liberty to ask such question of the witness for the purpose of showing that he was interested and incompetent to give evidence relative to the location of *Carrollsburg*. The plaintiff excepted.

2. The plaintiff then offered in evidence a deed from *William Cochran's* executors to *James Young*, dated the 17th of August 1773, for 200 acres of land, part of *Car-*

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rollsburg. Also a deed from *Samuel Emmit* to *William Shields*, dated the 29th of September 1787, for 106 acres, part of *Carrollsburg*. Also a deed from *Samuel Emmit* to *Samuel Carrick*, dated the 29th of September 1787, for 180 acres, part of *Carrollsburg*. Also a deed from *Charles Carroll* to *William Cochran*, dated the 6th of May 1757, for 2750 acres, part of *Carrollsburg*. And also a deed from *Samuel Emmit* to *William Emmit*, dated the 12th of August 1785, for 35 acres, part of *Carrollsburg*, wherein the lots of a new town called *Emmitsburg* are laid out, excepting as hereinafter excepted; and the different locations of those deeds made upon the plots by the plaintiff; and also in what manner the defendant had located the same. He also gave in evidence, that the main-street of the town of *Emmitsburg* is truly located on the plots by the plaintiff, and that the town is laid out upon the piece of ground so contained in the deed from *Samuel* to *William Emmit*; and that a large part of the town, which is now held and possessed by persons who have purchased lots therein, and have improved them, is without the lines of *Carrollsburg*, as located by the defendant, but within the lines of *Carrollsburg* as located by the plaintiff. He also gave in evidence the different improvements, cultivations, orchards, meadows and buildings, made under their purchases by the said *Young*, *Carrick* and *Shields*, as located on the plots, and the old divisional lines between the lands of *Carrick* and *Shields*, and between *Shields'* deed, and the part of *Carrollsburg* northwardly thereof. He further gave in evidence, that by establishing the out lines of *Carrollsburg*, as located by the defendant, it would cause a general confusion among the said tenants of parts of *Carrollsburg*, taking away from one the lands which he had possessed and cultivated, and the buildings and improvements he had made, and giving them to another, from whom also a part of the lands he had held and cultivated, and the improvements he had made, would be transferred to a third person, &c. The plaintiff's counsel, in addressing the jury, contended that they had a right to exercise a sound discretion in determining what location they would allow for the tract of land called *Carrollsburg*; whether they would settle the lines according to the present running, or by any other location, and that in doing this, they had a right, and it was their duty to fix the location in such man-

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ner as would best preserve to the different tenants of *Carrollsburg* the lands belonging to them, according to the manner in which they had held and improved them; and that they were not obliged to fix the lines of *Carrollsburg*, by their verdict, according to the location of the defendant, even though they should believe, that when *Carrollsburg* was originally surveyed it run correspondent with that location, as the lines of *Carrollsburg* are confined to course and distance, and do not correspond therewith, nor did when *Shields' Adventure* was taken up, but left the same out of the lines of *Carrollsburg*, as they then actually run. The defendant then gave evidence to prove, that he does not claim or make title to the land for which he takes defence, or any part thereof, or to any other lands, under or from the deed from *Samuel Emmit* to *William Shields*, from *Samuel Emmit* to *Samuel Carrick*, or from *Samuel Emmit* to *William Emmit*, or either of them; and that the location of *Carrollsburg*, according to which he has taken his defence on the plots, does not produce a general confusion among the holders of the said tract; and that the location thereof, contended for by the plaintiff, does not reconcile the said holdings, or the divisional lines, among the holders thereof. He also gave in evidence, that the location of *Carrollsburg*, according to which the defendant has taken his defence, is the true original location of that tract when the lines thereof were originally run. He then prayed the opinion of the court, and their direction to the jury, that the true location of the said tract is a question of fact to be decided by the jury on the evidence, and that it is the duty of the jury to find the location of the said tract in such place where, from the evidence, they should be of opinion that the lines thereof were originally run, unless they shall also find from the evidence that the defendant is prevented by some agreement, by adverse possession, or by some other legal bar, from availing himself of the said original location. This opinion the court gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at this term before CHASE, Ch. J. and NICHOLSON, and EARLE, J.

Martin, and *Pigman*, for the Appellant, on the *first* bill of exceptions, cited *Peake's Evid.* 122. *2 Esp N. P.* 70, *(489;)* and *Chapline's Lessee vs. Keedy*, 3 *Harr. & M'Hen.* 578.

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Shaaff, *Taney*, and *Harper*, for the Appellee, on the same exceptions, cited *Dickinson vs. Shee*, 4 *Esp. Rep.* 67; and *Peake's Evid.* 164, 152.

THE COURT dissented from the opinion of the County Court in the *first* bill of exceptions, and concurred in the opinion in the *second.*

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

GIST vs. M'GUIRE.

DECEMBER.

In an action on an injunction bond it appeared that a judgment was recovered at law in 1797 for a sum of money, (without interest) and costs. The injunction, which had been granted to stay proceedings on the judgment, was dissolved in 1803, and the bill dismissed in 1805. A *fi. fa.* issued on the judgment at law in 1803, and in 1803 and 1804 two payments were credited, which left a small balance due. On this balance interest was calculated from the last payment to 1805, when a receipt for the sum then stated to be due, in full of the judgment, was given by the plaintiff's attorney before this action was brought. The plaintiff claimed damages equal to the interest on the principal sum for which the judgment was rendered, during the time the judgment was enjoined—*Held*, that he was entitled to recover.

APPEAL from *Frederick* County Court. This was an action brought on the 20th of January 1809, on a bond executed on the 22d of December 1797, by *Thomas Samuel Pole*, with *Joshua Gist*, (the defendant and now appellant,) and *Upton Bruce*, his sureties, conditioned that the said *Pole* prosecute an injunction obtained by him out of the court of chancery, to stay proceedings at law on a judgment obtained against him in the general court at October term 1797, by *Ross M'Guire*, (the plaintiff and now appellee,) for £300 current money, and costs. General performance pleaded. Replication, nonperformance, setting forth the proceedings in chancery, and assigning a breach, &c. Rejoinder, payment. Surrejoinder, nonpayment, and issue joined.

1. At the trial the plaintiff offered in evidence a record from the court of chancery, referred to and set out in the replication, being a copy of the proceedings on the injunction bill filed by *Thomas S. Pole*, administrator of *Legh Master*, against *Ross M'Guire*, stating, that on the 12th of July 1803, the chancellor dissolved the injunction, and that on the 28th of January 1805, the bill was dismissed. The defendant then offered in evidence, that a writ of *fieri facias* issued on the judgment mentioned in the said record, returnable to the general court at October term 1803. And further offered in evidence, by consent, the following receipt of *W. T. T. Mason*, Esq. the attorney for the plaintiff, and the statement of the said *fieri facias*, viz.

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"October term 1803. No 154.

"*Fi. fa.* Damages,	£300 0 6
Costs,	22 8 7½
	322 8 7½
1803, Oct. 5th, paid pl'ff. 180	
1804, Dec. 1, paid do. 114 7 6	
	244 7 6
Bal. yet due pl'ff.	78 1 1½
Interest from 1st Dec. 1804 to Feb. 17, 1808,	15 0 2
	93 1 3½

February 17, 1808. Received of Mr. *James Clarke*, by the hands of Col. *John M'Pherson*, the sum of ninety-three pounds one shilling and three pence, being the balance in full of a judgment obtained in the late general court by *Ross M'Guire* against *Thos. S. Pole*, adm'r. of *Legh Master*.

Wm. T. T. Mason, Att'y. for *Ross M'Guire*."

He also proved, that the said balance was paid over to the plaintiff. The plaintiff admitted to the jury that the principal sum of money due on the judgment, and for which the *fieri facias* issued, was paid before the bringing this suit, but claimed damages equal to the interest on the principal sum for which the judgment was rendered, during the time the judgment was enjoined. The defendant then prayed the direction of the court to the jury, that if they believe from the evidence that after the injunction on the judgment was dissolved, the plaintiff sued out a *fieri facias* on the judgment, and that he received the full amount of the judgment before the bringing of this suit on the injunction bond, that then the plaintiff is not now entitled to recover any interest on the said judgment as damages, during the time the plaintiff was enjoined by the injunction, But the Court, [*Buchanan*, Ch. J. and *Shriver* and *Nelson*, A. J.] refused to give the direction. The defendant excepted.

2. The plaintiff also prayed the court to direct the jury, that upon the evidence aforesaid their verdict ought to be for the plaintiff; and he further prayed the court to direct the jury, that if from the evidence they should be of opinion that the plaintiff was delayed in obtaining of the money recovered in the judgment against *Thomas S. Pole*,

for any period of time after the recovery had, and for which time he hath not received any interest on the said money, and that such delay of payment was occasioned by reason of the suit in chancery of the said *Pole*, that then such delay of payment of the money, so recovered by the judgment against the said *Pole*, is a proper circumstance for the jury to take into consideration in assessing the damages for the plaintiff, notwithstanding he may, before the bringing of this suit, have received all the money which he could have levied by execution on the said judgment against the said *Pole*, and that the legal interest of the money, the payment of which was so delayed, is a reasonable measure of the damages to be assessed by the jury. Which prayer the court granted, and directed the jury accordingly. The defendant excepted.

3. The defendant then prayed the opinion of the court to the jury, that if the plaintiff had received any interest on the judgment aforesaid, subsequent to the dismissal of the bill, the same ought to be deducted out of any sum which may be allowed by the jury. But the court refused to give the said direction. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J.

Shaaff, for the Appellant, contended—1. That no suit could be brought for interest; that if the principal debt had been extinguished, the damages consequent thereon were gone. 2. The court peremptorily direct the jury, as stated in the *second* bill of exceptions, to find for the plaintiff, without leaving it to the jury. There were two contradictory applications made for the court's direction to the jury, and the court, on one of them, directed the jury to find for the plaintiff, and on the other left it to the jury. 3. The direction asked for in the *third* bill of exceptions ought to have been granted; for if any interest had been paid, (as nothing was claimed by the plaintiff but interest,) it surely ought to have been deducted by the jury. The original judgment in the general court was on an award, and no interest was given. On the injunction bond to stay proceedings on that judgment, no interest could be recovered. The action ought to have been on the judgment,

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Eversfield vs. Eversfield

and then interest might have been recovered, if the principal sum had not been paid. On the *fieri facias* issued on the judgment, no interest could be claimed, and when this action was brought, more than the amount of the judgment had been satisfied. The plaintiff having waived his action of debt on the judgment, his right to recover interest was lost. He chose to take a *fieri facias* on the judgment, under which the amount recovered was paid.

No Counsel argued for the Appellee.

THE COURT concurred in the opinions expressed by the County Court in all the bills of exceptions.

JUDGMENT AFFIRMED.

DECEMBER.

EVERSFIELD'S EX'X. vs. EVERSFIELD'S Representatives.

On the petition of E, as the executrix of her husband, to the orphans court, for an allowance of commission on the amount of the inventories returned, that court decreed that no commission be allowed—1 Because in all the settlements made by the agent of the executrix, all his expenses were charged and allowed, under an express avowal by him that no commission would be charged by her, 2. In consequence of the abandonment of commission, charges against the estate, where vouchers were not in form, or altogether wanting, were allowed. On appeal *reversed*, and decreed that the executrix be allowed for her commission 5 p. c. on the amount of the inventories, excluding what may have been lost or may have perished,

APPEAL from the Orphans Court of *Prince George's* county. In this case a petition was filed in the court below by the appellant, as executrix of her husband, for an allowance of commission on the amount of the inventories returned. The answer to this application stated, that the counsel of the executrix, and her agent, on their application to have her personal expenses allowed, had declared that it was never the intention of the executrix to charge a commission; and in the settlement of her final account she had elected to take an allowance for her personal expenses in lieu of her commission. The replication denied all the facts stated in the answer, and then followed a statement of the amount and nature of the estate. The record also contained the will of the testator, the inventories returned, and the several accounts of the executrix passed by the orphans court, in which there are allowances made for personal expenses, amounting to £64 17 10. The decree of the orphans court was, "that no commission be allowed, for the following reasons:—*First.* Because in all the settlements made by the agent for the executrix, all his expenses were charged and allowed by this court, under an express avowal of the said agent that no commission would be charged by the executrix. *Secondly.* Because in some of the items forming the different charges against the estate, vouchers were not in form, or were altogether wanting, yet they were allowed in consequence of the aban-

donment of the commission. *Thirdly.* Because on the final decision of the case on the first bill filed by *T. Eversfield*, and others, against the executrix, the court were, on two points of great importance, divided, and yet their decision was in favour of the executrix, and that too in consequence of their being no commission allowed. Under these circumstances the court are of opinion, that the prayer of the petitioner cannot be allowed." From this decree the present appeal was taken.

The cause was argued before BUCHANAN, NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

Magruder, for the Appellant. The case, it will be observed, was not set down upon bill and answer. The complainant, in her replication, denied all the facts stated in the answer; and there is not one word of testimony in support of the facts stated by the defendant, nor would those facts, if true, be an answer to the complainant's claim. What are the facts? It is alleged that the complainant's agent, or counsel, said that the complainant intended or promised to give up her commission. This is denied, and there is no proof of it. But if it was true, the court cannot compel her to execute that intention. The law is express, that the court shall allow a commission, and this commission is to be not less than five and not to exceed ten per cent. The orphans court could not refuse to her that which the law expressly secures to her. The *second* and *third* reasons assigned by the court are equally without foundation. They suppose that they were not altogether correct in their former proceedings, and by way of balancing the account, they would now deprive the complainant of her just rights. The correctness of the former decree is not now to be considered, though it has been impeached by the judges pronouncing it. If it was wrong, the now defendant should have appealed from it. Whether there was an appeal or not, is not stated. But whether appealed from or not, this court has now nothing to do with it. The judges further say, that an allowance was made in the former suit for the personal expenses of the executrix; if so, and it was wrong, those injured ought to have appealed. If the judgment was affirmed, or there was no appeal, this court can now have no right to inquire if it be in any respect erroneous. The testamentary sys-

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tem authorises the court to make allowance for all personal expenses incurred by executors in the settlement of the estate. Even if it did not, the error of the former judgment could not now be rectified; nor is it right to do wrong in this suit, because the court might possibly have done wrong in a former one.

The next question is, What commission ought to be allowed? It cannot be less than five, nor more than ten per cent. This question is submitted to the court upon the inventory and accounts, and upon the will. It appears that there was considerable trouble and difficulty imposed upon the executrix by the will. She is the widow of the deceased, asking of her children remuneration for that trouble. The court, upon examination of the case, will say, that she ought to receive as liberal a commission as the law will authorise them to give.

No Counsel argued for the Appellees.

The Court *reversed* the decree of the orphans court, and decreed that the appellant, as executrix of *M. Eversfield*, be allowed for her commission five per cent. on the amount of the inventories returned by her as executrix as aforesaid, excluding what may have been lost or may have perished; and that the orphans court decree in the premises in conformity to this decree.—*Decreed* also, that the appellees pay to the appellant her costs incurred in the court below, and in this court.

DECREE REVERSED.

DECEMBER.

A sale of an unsound slave, known to be so by the seller, and concealed from the purchaser, held fraudulent, and the purchase money recovered back.

Declarations, explaining the object of writing a letter, admitted to be given in evidence, tho' offered by the party making them, and by whom the letter was written.

DUVALL VS. MEDTART.

Appeal from *Frederick* County Court. This was an action on the case, to recover damages for a fraud in the sale of an unsound slave. The declaration contained two counts—1. For the sale of an unsound slave; and 2. On a warranty, &c. The defendant, (now appellee,) pleaded not guilty, and issue was joined.

1. At the trial the plaintiff offered in evidence, that the negro man, mentioned in the declaration, was sold to him by the defendant for $400, in the manner mentioned in the declaration. That he was ruptured and diseased be-

fore and at the time of the sale, and that the defendant knew him to be so, and concealed it from the plaintiff. The defendant then offered evidence, that the negro was sound at the time of the sale; and that about four months after the negro was so sold, the plaintiff wrote to a certain *Christian Kemp*, by the negro, offering him the said negro for the sum of $400 cash, or $450 credit. The plaintiff then offered evidence, that the negro had a wife at *Kemp's*, and wished to go to him. And also offered to prove by a competent witness, who was present at the time the said letter was written, that he, the plaintiff, said at that time that he would fix a price, which he knew would prevent a purchase by *Kemp*, and that he only wrote the letter in order to deceive the negro, and to prevent him from absconding, through fear of being returned to the defendant. Neither *Kemp* nor the defendant were present at the time. The defendant objected to this evidence, and prayed that the same might not be permitted to be given to the jury. And the Court, [*Buchanan*, Ch. J. and *Shriver*, A. J.] were of opinion, that the same was not legal and competent testimony, and refused to permit it to go the jury. The plaintiff excepted.

2. The plaintiff having offered in evidence that the defendant sold him the negro in question for $400, upon the terms mentioned in the first count in the declaration, then offered to read in evidence a bill of sale, executed on the 24th of July 1810, by which the said negro was transferred to the plaintiff by the defendant, for the consideration of $400, and whereby the defendant warranted and defended the said negro to the plaintiff, against him the defendant, his executors, &c. and against every other person or persons whomsoever; and that the said negro was then and there delivered to the plaintiff. The plaintiff further offered in evidence, that at the time of the said sale and conveyance the said negro was unsound, diseased, ruptured, and afflicted with the consumption, and was unable to do ordinary and usual labour from the time of said sale, in consequence of said diseases; and that the said negro was known by the defendant to be so diseased at the time of the sale; and that he concealed the same from the plaintiff. The defendant then offered in evidence, that the negro was sound at the time of the sale; and also offered in evidence, that about three weeks after the sale and conveyance, in a conversa-

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tion between the plaintiff and defendant, the plaintiff complained that the negro could not work, and that the defendant told him he ought to make him. Plaintiff then said I will examine him whem I go home, and if I find he is not sound, I will return him. Defendant said do so. The negro was not returned, but died in possession of the plaintiff in December 1810. The defendant then prayed the opinion of the court to the jury, that if the jury should find from the evidence, that after the sale of the negro mentioned in the declaration, it was agreed between the defendant and plaintiff, that the plaintiff should examine the negro, and if any defect was found, that then the plaintiff might return the negro to the defendant. and that the contract should in such case be vacated; that if the negro never was returned, that then the plaintiff is not entitled to recover on the first count in the declaration. Of this opinion the court was, and so directed the jury, with the qualification that the plaintiff was not induced to continue the negro in his possession by misrepresentations of the defendant, (as to his health and soundness,) at the time of the conversation above stated, or subsequent thereto. The plaintiff excepted.

3. The defendant then prayed the court to direct the jury, that if they do not find from the evidence, that at the time of the sale of the negro the defendant affirmed that he was sound, that then the plaintiff is not entitled to recover on the first count in the declaration. This direction the court refused to give. The defendant excepted. The verdict and judgment being against the plaintiff, he appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J.

Taney, for the Appellant. 1. To show that the declarations of the plaintiff below offered to be given in evidence, as stated in the *first* bill of exceptions, ought to have been permitted by the court below, he referred to *Holsten vs. Jumpson*, 4 *Esp. Rep.* 189; and *Phillips vs. Eamer*, 1 *Esp. Rep.* 357.

2. That the plaintiff, at the time the defendant offered to take back the negro, had then a full cause of action, and therefore the defendant's consenting to permit the negro to be returned did not take away that cause of action. If

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Easton vs Snavely

the negro was unsound, the right of action related to the time of the sale, and was not done away by the after agreement or permission assented to by the defendant. Those cases where the thing sold must be returned, are where the agreement for the return is a part of the original contract, and is not applicable to subsequent agreements. He referred to 2 *Com. on Cont.* 281.

Shaaff, for the Appellee. 1. The declarations made by the plaintiff, which he wished to give in evidence, went to contradict the letter, and to show an imposition was then contemplated, and therefore were properly rejected. 2. There was a new contract which vacated the first, and the new contract not having been complied with, the original contract was terminated. The plaintiff under the second contract, being a physician, was bound to examine the negro, to see whether or not he was sound, and if he did not, or if he did and found him unsound, and did return him, he was bound by that contract, and can have no claim under the first agreement.

The Court dissented from the opinions given by the court below in the *first* and *second* bills of exceptions. The *third* bill of exceptions, having been taken by the defendant below, was not before the court.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

Easton vs. Snavely's Lessee.

December.

Where the verdict in an action of ejectment was general against the defendant, for all the land for which he took defence on the plots, and the judgment was entered by lines described on the plots, which included more and than the defendant took defence for—On appeal the judgment was affirmed

Appeal from *Washington* County Court. Ejectment for a tract of land called *Showman's Forest*, containing 50 acres. The defendant (now appellant,) took defence on warrant. The plaintiff located his claim and pretensions on the plots returned in the cause for only part of *Showman's Forest*. The defendant took defence for a part of the land so located by the plaintiff as his claim. At the trial there was a general verdict for the plaintiff, and the judgment entered was by lines on the plots, and for much more land than the defendant took defence for. From this judgment the defendant appealed to this court.

The cause was argued before Chase, Ch. J. and Nicholson, Earle, and Johnson, J.

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Taney, for the Appellant. As the record stands it would seem that the verdict as therein stated does not justify the judgment. The land found for the plaintiff is not described with sufficient certainty in the verdict; because in his declaration he claims the whole of *Showman's Forest*, but in his locations on the plots he narrows his claim to a small part of it, and it does not appear to which claim the finding of the jury was intended to apply. The judgment indeed is sufficiently certain in the description of the land, and is stated to be according to the finding of the jury. But it is necessary that the verdict itself should describe the land with certainty, and should be stated in the record, in order that the court above might judge whether the verdict authorised the judgment; so are the precedents, 2 *Harr. Ent.* 234. But if it is considered that the record is substantially correct in this respect, and that it sufficiently appears that the verdict is according to the judgment, then it is objected, on the part of the appellant, that the judgment is erroneous, because it is for more land than the plaintiff claimed, as he himself located his claim on the plots. It is well settled that the plots in an action of ejectment are a part of the pleadings in the cause. The plaintiff's pretensions, and the defendant's defence, make the issue to be tried. The issue between the parties is on the plots. The plaintiff, therefore, cannot recover more land than he claims on the plots, because his location of his claim there, is a part of his declaration. The defendant cannot be prepared to defend himself against a larger claim than the plaintiff locates. The verdict in this case, so far as it exceeded the claim located, would be absolutely void, and would not support the judgment for such excess. The plaintiff might have taken judgment for so much land as his pretensions included, but for no more. Here he has obtained judgment for a great deal more. *Trials per Pais*, 324. As the defendant in the court below is the appellant, and the judgment one entire judgment, it cannot now be reversed in part, or a new judgment given for the plaintiff for so much as he may have been entitled to recover in the court below. *Parker vs. Harris*, 1 *Salk.* 262. *Frederick vs. Lookup*, 4 *Burr.* 2018. Neither can the appellee derive any benefit from the acts of assembly of 1809, *ch.* 53, and 1811, *ch.* 161. The *third* section of the last act relates to cases where the judgment is entered for a greater

sum of money than the damages laid in the declaration. The *fourth* section of the same act, as also that part of the act of 1809 to which it has reference, embraces only those cases where "*an entry is made or act done*" by one of the parties, and authorises this court to give such judgment as the "*entry or amendment*" may require, or as the court below would have rendered if such "*entry or amendment*" had been there made before judgment. In this case no "entry or amendment" of the plaintiff in the court below, could have altered, or in any way affected, the judgment which ought to have been there given. No entry or amendment on his part was required, in order to have obtained a correct judgment; nor can he now make any "*entry, or do any act,*" that will "require an alteration of the judgment given in the court below." In the court appealed from, and in this court, no act, entry or amendment, on the part of the plaintiff, would change the judgment to such an one as ought to have been given. It would stand on the same grounds, as to the point now in controversy, with or without an entry or amendment on the part of the plaintiff; for the verdict of the jury, so far as it exceeded the matter in issue, was merely void, and the judgment ought to have been rendered on the verdict for so much only as was in issue between the parties; and no entry or amendment of the party was necessary to obtain such judgment. *Trials per Pais*, 324. The judgment given is inconsistent with itself. It purports to be only for land for which the defendant took defence within the claim and pretensions of the plaintiff as located; but in describing by lines the limits of the plaintiff's pretensions, they are made to include much more land than he located as his claim.

Martin, for the Appellee. The jury, by their general verdict, found nothing more than what was in issue between the parties. The judgment is for all the land for which the defendant took defence. The clerk has described in the record certain lines, which was a full description of the whole of the plaintiff's pretensions; and at most it is only a clerical error in the description, the whole of which was unnecessary.

JUDGMENT AFFIRMED.

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DECEMBER.
Offutt vs Trail

A demand of rent in arrear, before a distress is made, is not necessary.

OFFUTT VS. TRAIL.

APPEAL from *Montgomery* County Court. This was an action of replevin. The defendant, (now appellant,) avowed as bailiff for *Eleanor Offutt*, junior, for rent in arrear. Plea—not tenant, &c. Issue joined. At the trial the defendant offered in evidence, that the plaintiff had leased by parol the lands mentioned in the pleadings for one year, beginning on the 1st of January 1809, and ending on the 31st of December in the same year, for the rent of $100, which sum was to be due and payable on the 1st of October in that year, provided it was called for. That *Eleanor Offutt*, junior, mentioned in the pleadings, was legally entitled to the said rent; and that the defendant, her mother, was her agent and bailiff, duly authorised by her to demand, receive and distrain, for the same. That on the 27th of September 1809, notice was duly given to the plaintiff that the rent would be required on the 1st of October 1809; and that the rent, not being paid, the property mentioned in the declaration of the plaintiff was regularly distrained for the rent by the defendant, as bailiff of *Eleanor Offutt*, jun. on the 4th of October 1809. The plaintiff then prayed the opinion of the court to the jury, that by the terms of the lease, the plaintiff's property was not liable to distress for the rent, unless it had been demanded of him on or after the 1st of October 1809, and before the distress was made. Which opinion the Court, [*H. Ridgely* and *Harwood*, A. J.] gave to the jury. The defendant excepted; and the verdict and judgment being against her, she appealed to this court.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, and JOHNSON, J.

Taney, for the Appellant, contended that there need not be a formal notice or demand for rent in arrear, before a distress could be made. That the distress itself was a demand. He cited 6 *Bac. Abr.* tit. *Rent*, (I).

No Counsel argued for the Appellee.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

THE STATE use of WILCOXEN vs. WOOTTON.

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APPEAL from *Montgomery* County Court. An action of debt was brought, on the 22d of November 1811, on an administration bond, executed to the state on the 10th of November 1788, by *Ruth Wilcoxen*, *Thomas Swearingen*, *George Wilcoxen*, and *Richard Wootton*, (the defendant and now appellee,) conditioned, that if the above bound *Ruth Wilcoxen* and *Thomas Swearingen*, administrators of all and singular the goods, chattels and credits, of *George Wilcoxen*, late of *Montgomery* county, deceased, do make, &c. and concluded in the usual form. The defendant pleaded general performance, and the act of 1729, *ch.* 25, *s.* 21, limiting the time within which actions on administration and testamentary bonds shall be brought. The plaintiff, by the replication to the first plea, stated that *George Wilcoxen*, otherwise called *Anthony Wilcoxen*, of, &c. deceased, died intestate, leaving a widow and five children, amongst others *Anthony*, for whose use this suit is brought. That administration on the estate of the said *George Wilcoxen*, otherwise called *Anthony Wilcoxen*, was granted to *Ruth Wilcoxen*, and *Thomas Swearingen*, who entered into bond, &c. and returned an inventory amounting to £227 11 1, which sum remained to be divided amongst the widow and five children, whereof the widow was entitled to a third. That the one fifth of the personal estate of the said *George*, otherwise called *Anthony*, in five parts, to be divided among his five children, after the widow's thirds deducted, amounted to £30 6 9, belonging to the said *Anthony*, for whose use this suit is brought, as one of the heirs and representatives of the said *George*, otherwise called *Anthony*, the intestate, which said sum the administrators had not paid, &c. The replication to the *second* plea stated, that the said *Anthony*, in the endorsement of the original writ mentioned, was an infant under the age of 21 years, and while so an infant was, on the 1st of September 1794, removed to parts beyond the seas, viz. in the state of *Virginia*, where he continued until the 1st of October 1811, when he returned into this state, and that within six years next after his return, to wit, on, &c. the original writ was sued forth. The defendant rejoined to the first replication, that *George Wilcoxen*, named in the bond on which this suit was brought,

In an action on an administration bond executed on the estate of *George W*, the defendant pleaded general performance, and the plaintiff replied non performance, setting forth the death of *George W*, otherwise called *Anthony W*, intestate, and the granting administration, &c. the return of an inventory by the administrators, &c. in the usual form of such replications, describing the deceased throughout as *George W*, otherwise called *Anthony W*. The defendant rejoined, that *George W*. was not called or known by the name of *Anthony W*. The inventory returned by the administrators was on the estate of *Anthony W*. Evidence was offered that the name of *George W* was inserted in the bond by the defendant, one of the sureties therein. The plaintiff offered to prove that the *George W*, named in the bond, was known by the name of *Anthony W*, and that R W and T S, the obligors in the bond, never were executors or administrators on the estate of any other deceased but the one named in the bond, and that the inventory was returned by them as administrators of the deceased mentioned in the bond. And also offered to prove by parol evidence, that the *George W* deceased, mentioned in the bond, and the *Anthony W*, mentioned in the inventory, were one and the same person; and offered to read in evidence the inventory, stated to be of the goods, &c. of *Anthony W*, and proved by R W and T S the administrators. The

county court refused to permit the evidence to be given, but on appeal *reversed*.

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and on whose estate letters of administration were granted, was not called or known by the name of *Anthony Wilcoxen*, and that no letters of administration were ever granted to the said *Ruth* and *Thomas;* that no inventory on the said intestate's estate, mentioned in the said bond, ever was returned, &c. To the *second* replication the defendant rejoined, that the original writ was not issued within six years after the said *Anthony* arrived at the age of 21 years, and came in the state as aforesaid. Issues were joined; and at the trial the plaintiff offered in evidence, that the name "*George Wilcoxen*," in the original bond in this case, where the said name follows immediately the words "*chattels and credits of*," and precedes immediately the words "*late of Montgomery county, deceased*," in the condition of the said bond, is in the proper hand-writing of the defendant, one of the obligors in the bond. The plaintiff then offered to prove, that the *George Wilcoxen*, deceased, named in the condition of the bond, was known by the name of *Anthony Wilcoxen;* that *Ruth Wilcoxen* and *Thomas Swearingen*, obligors in the bond, never were executors or administrators on the estate of any other deceased but the one named in the condition of the bond, and never had from the orphans court any letters testamentary or of administration except those referred to in the bond, and never returned any other inventory than the one hereinafter referred to. And also offered to prove, by one of the appraisers whose name is signed to the said inventory, and by the register of wills, that the said inventory was returned by them as administrators of the said deceased, mentioned in the condition of the bond, and were assets of the said deceased. And also offered to prove by parol evidence, that the *George Wilcoxen*, deceased, mentioned in the condition of the bond, and the *Anthony Wilcoxen* mentioned in the said inventory, were one and the same persons. And offered to read to the jury the said inventory, stated to be "an inventory of the goods and chattels of *Anthony Wilcoxen*, late of *Montgomery* county, deceased," and signed by certain persons as the nearest of kin, by certain creditors, and by the appraisers, and proved on the 11th of February 1789, by *Ruth Wilcoxen* and *Thomas Swearingen*, administrators of *Anthony Wilcoxen*, deceased, before the register of wills of *Montgomery* county. To the admission of the evidence

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above offered, the defendant objected; and the Court, [*Harwood* and *Ridgely*, A. J.] refused to permit it to be given; and were of opinion, and so directed the jury, that the inventory offered by the plaintiff cannot be admitted as evidence to charge the defendant for assets alleged to have come to the hands of the administrators, unless it shall appear to the jury that the intestate was called and known by the name of *George Wilcoxen*, as well as *Anthony Wilcoxen*; and that the bond itself, and the evidence above stated, is not sufficient evidence of that fact. The plaintiff excepted; and the verdict and judgment being for the defendant, this appeal was prosecuted by the plaintiff.

The cause was argued before CHASE, Ch. J. and NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

Taney, for the Appellant. The name of *George* was inserted in the bond instead of *Anthony*. There was no evidence what was the true name. The parties called him *George*, others called him *Anthony*. If a man signs a bond by a wrong name, it may be said he is called as well by one name as another. 4 *Bac. Ab.* tit. *Misnomer and Addition*, (B) *(and notes.)* He is *estopped* from denying the name signed. 10 *Vin. Ab.* 463. The principle here is the same as if the obligors had called themselves by different names. They named the deceased by a wrong name, and they are bound by it.

F. S. Key, for the Appellee. If the evidence offered were admitted, it would be letting in parol proof to deny the record. The estate administered on is different from the estate on which the plaintiff claims. An attempt was made to prove that the inventory was on the estate of a different person from what it purports to be. If the deceased had been known as well by the name of *George* as that of *Anthony*, it would be different. The replication attempts to set it out, but there is no proof of the fact. The defendant in his rejoinder denies that he was called by both names. The defendant might be estopped from denying his own signature, but there is nothing to estop him from saying the deceased was not the person named in the bond.

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One of the issues was on the act of limitations, and the jury have found that issue for the defendant. This puts the case at rest.

Taney, in reply. The verdict is general, and being for the defendant, went to all the issues Whether limitations barred or not, the plaintiff, under the opinion of the court, could not recover. The replication states expressly that the deceased was called as well by the name of *George* as *Anthony*; and the rejoinder refers to the name in the bond. There was an attempt to connect the inventory with the bond, to show that it was the inventory on the estate upon which letters of administration had been granted. The evidence was not rejected because it was not sufficient, but because there was no evidence that he was called as well by the one name as the other. The obligors gave the name to the deceased, and they are estopped to deny he was not called by both names. The inventory is the act of the administrators, and their miscalling the deceased shall not benefit them. It is their act, and others are not to be injured thereby.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER.

JOHNSON VS. MEDTART.

A writ *de homine replegiando* cannot legally issue from any of the courts of law of this state.

APPEAL from *Frederick* County Court. In this case a writ *de homine replegiando* issued, (bond with security for that purpose having been first given,) to replevy the plaintiff, (now appellant,) out of the possession of the defendant, (the appellee.) The writ commanded the sheriff, "that justly and without delay you cause to be replevied *J Johnson*, whom *J. Medtart* hath taken, and doth keep taken, as it is said, unless he was taken by the command of any of the justices of the said state for death of man, or for any other right for which he may not be replevied according to the laws of this state, that we may hear no more clamour thereupon for want of justice. Hereof fail not," &c. The sheriff returned the writ, "Replevied, and the defendant summoned." The defendant appeared and moved the court *ex officio* to quash and abate the writ, for the following reasons: 1. Because it has been issued by the clerk of this court contrary to the practice of this court, and contrary to the laws of this state. 2. Because the writ upon the

face of it is *de facto* a nullity and destroyed, having no practice of this court, or laws of this state, to support it, and ought to abate by the direction of the court *ex officio*, without any plea thereto on the part of the defendant. 3. Because the writ is defective in form. 4. Because this court can take no cognizance of any such writ by any practice of this court, or any law of this state. The county court, for the reasons assigned, quashed the writ, and ordered that the plaintiff redeliver himself to the defendant. The plaintiff appealed to this court.

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Ross, for the Appellant. The motion in the court below was to quash the writ *de homine replegiando*, on the ground that the county courts of this state have no jurisdiction to sustain such a writ; and the court determined that they had no jurisdiction to issue the writ, and ordered it to be quashed. The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person. 3 *Blk. Com.* 129. It is an original writ, and the party may sue it of right. It is properly returnable in the courts of law, and may be there declared upon. *Treblecock's* case, 1 *Atk.* 633. Being an original writ, and consequently issuing from the court of chancery, which in *England* is the *officina justitia*, furnishes no argument against the jurisdiction of the county courts in this state, where their writs and process, like their laws, are formed on a plan which by experience have been found applicable to their local and other circumstances. Thus in *England*, the original writ is the king's warrant for the judges of the common pleas, &c. to proceed to the determination of the cause, and is the foundation of their jurisdiction; but the county courts of this state derive their authority from a different *officina justitia*, and their jurisdiction does not rest upon the mandatory writ of the chancellor. The writ of replevin at common law in *England* is an original writ, and issues from chancery, and it is the common law replevin that has been adopted in this state, for there can be no replevin in this state under the statute of *Marlbridge*. The county courts have been in the constant practice of issuing the common writ of replevin, without any special mandate from the court of chancery, and their jurisdiction has never been called in question; and if there is in *England* a difference between the writs *de homine replegiando*,

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and the common replevin at common law, in what consists their difference in this state that the county courts should have jurisdiction in the one case and not in the other? Does the *habeas corpus* act create that discrimination, by rendering the writ *de homine replegiando* in a great measure obsolete? The common law, and its remedies, are not repealed by nonuser, nor does the giving a new writ take away the old remedy, unless it be so expressly provided. The writ *de homine replegiando* issued in many cases in *England*, after the passage of the *habeas corpus* act. *Designy's* case, *Sir T. Raym.* 474, decided in 1682. *Moor vs. Watts*, 2 *Salk.* 581, decided in the reign of *William* III. They have also issued in *Baltimore* and *Harford* counties. By the *third* section of the bill of rights, the inhabitants of *Maryland* are entitled to the common law of *England*, and the trial by jury, according to the course of that law. By the *twenty first* section, no free man ought to be taken and imprisoned, &c. or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land. The court will perceive by a perusal of the *habeas corpus* acts of this state, that many instances may occur, (and none more striking than the plaintiff's case, who was denied the right of controverting the return to the *habeas corpus*, which he had obtained,) in which an inhabitant of this state may be deprived of his liberty contrary to the common law, and without the judgment of his peers, unless the county courts have jurisdiction to issue writs *de homine replegiando*. The *habeas corpus* act makes it the duty of the chancellor, judge or justice, either to discharge, admit to bail, or commit, &c. To admit to bail by the act supposes the party committed for some offence cognizable in the criminal court. The commitment is ordered where the party is charged with an offence not bailable; and the party is only restored to his liberty if it shall appear to the judge that he is detained without any legal warrant or authority. In the two first cases the inhabitant will be tried according to the course of the common law, and have the benefit of a trial by his peers; but if the party is in the custody of a recruiting officer, and detained upon a pretended or illegal enlistment, this offence, not being cognizable in the criminal court, no recognizance can be taken for his appearance in the county court the term following, to try him by his peers, but he

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is either discharged or committed, as the opinion of the judge may be on the enlistment; and if committed—to whom? To the custody of him by whom he was detained —the recruiting officer? And is thus deprived of his liberty without the judgment of his peers passing upon him, and left to his remedy upon the false return to the *habeas corpus*, should it be false; for a return may be true, and the original caption totally illegal, in which case the suffering individual would be deprived of even this shadow of redress, by an action for the false return. The general form of a return to a *habeas corpus* is, "that the party has not the person in his custody, possession or power." *The King vs. Winton*, 5 *T. R.* 91. An officer may order his recruit to a distant post, under a superior officer, and distinct command, and upon a return to a *habeas corpus*, issued by the father for his son, or master for his apprentice, may with truth make the above return, though the taking of the son or apprentice, in the first instance, was the most flagrant invasion of personal liberty. The *habeas corpus* act, in such a case, would furnish no remedy, but the writ *de homine replegiando* would punish him for the illegal taking, though at its service upon him, the son, &c. was neither in his custody, possession or power. The writ *de homine replegiando* is a writ not unknown to the laws of this state, for it is specially recognized by the legislature in the act of 1810, *ch.* 63, *s.* 2; and surely it will be unnecessary to argue, that the county courts, having jurisdiction under this act to issue this writ upon the application of a negro for his freedom, have also the power to issue it upon the application of a free man to recover his liberty.

Pigman, for the Appellee. Upon the first and second reasons assigned in this case for quashing the writ *de homine replegiando*, if there was neither common law, nor statute law of this state, nor practice of the court, to authorise the use of it, it was the duty of the court *ex officio* to quash it, without requiring a plea in abatement. 1 *Bac. Ab.* tit. *Abatement.* The court will not call upon a defendant to plead in abatement or in bar, to any writ issued without lawful authority. In the language of the law, if the writ issues without lawful authority, it is *de facto* a nullity, and deserves no plea or replication of any sort. In *England*, this writ has long been disused, on account of the

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numerous exceptions which it contains, and of the superiority of the writ of *habeas corpus*. The exceptions will be found in 1 *Lill. Ent.* 293, and in other books of entries, and if they should be omitted in the writ, it would doubtless be quashed; for they contribute to mark out the sheriff's duty, which is a qualified one. We have always taken for granted, that *homine replegiando* could not issue out of our county courts. In *England* it can only issue from the law side of the court of chancery, as *officina justitia*. It is an original writ—so is the *alias* and the *pluries*. 14 *Vin. Ab.* 305, (A) pl. 1. 4 *Com. Dig.* tit. *Imprisonment*, (L. 4.) 361. *More vs. Watts*, 1 *Lill. Ent.* 293. *Reg.* 77. *Fitz. N. B.* 66. The *Withernam* which issues upon the return of *eloigned*, or the *pluries*, is a judicial writ, and goes from the court to which the *pluries* is returned; and it is the first *judicial* process in such an action. In *More vs. Watts*, 1 *Lill. Ent.* 293, will be found the entire proceedings in a *homine replegiando*, in which the plaintiff was nonsuited. It begins with the *pluries* from chancery, gives the return of *eloigned* made by the sheriff to the court of King's Bench. The *Withernam*, founded upon that return, issued by the King's Bench, and the consequent proceedings which terminated in a *non pros.* It is a great error to confound the *homine replegiando* with the common replevin, or *replevin de averis*. At common law the replevin *de averis* issued exclusively from chancery. 3 *Blk. Com.* 147. *Weaver vs. Lawrence*, 1 *Dall.* 156. The statute of *Marlbridge* authorised the proceedings by plaint, as it is found in all the books of entries; and it would seem that we have modelled our action of replevin for goods upon the proceedings by plaint. In *Weaver vs. Lawrence*, 1 *Dall.* 156, there is a great display of the law relative to the two modes of proceedings by writ and by plaint. From which it is clear, that the writ of replevin, even *de averis*, could only issue from chancery, it being an original writ, and not a judicial one. The statute of *Marlbridge* did not touch the *homine replegiando*, it applied wholly to replevin of goods—2 *Institutes*; and our practice cannot be said to have changed the common law in relation to the writ of *homine replegiando*, for we have no practice, (and never had,) upon the subject. There could be no inducement to recur to that antiquated and inadequate writ. The *habeas corpus*, and

petition for freedom, rendered it unnecessary and idle. It stands now, therefore, as it always has stood, upon the common law, and by the common law it must issue from chancery. The writ in this case must therefore be quashed, even if it were admitted that such writ could (as it is believed it could not,) be maintained in this state, if issued agreeably to the common law. If it were of any importance, it would be easy to show, that the case of a person detained as a recruit, regularly enlisted, is within the exception of the writ *de homine replegiando;* such a person is as much "*non replegiabilis*," as the person mentioned in 2 *Saunders* 60, (arrested on the King's writ.) The two cases are alike, and ought to receive the same judgment, and the sheriff may and ought to return the exceptions. The plaintiff was a soldier in the *United States* army. The mischief of interfering in time of war with the recruiting service, would even be greater than that of stopping the ordinary process of the law. The writ of *habeas corpus* can do little prejudice to the public, while it may be useful to the individual. It can never issue without cause shown on oath, and is soon disposed of. The writ of *homine replegiando,* is *ex debite justitia,* without cause shown, and if the sheriff does not do his duty with reference to the exceptions, (as he may either upon his own responsibility, or by taking the verdict of an inquest,) the recruiting service may be destroyed. No country could carry on war in which such an anomaly existed. Even if it had been lawful to issue the writ by the clerk of *Frederick* county court, from the very nature of the federal and state governments the soldiers of the army ought to have been inserted as one of the exceptions. To permit any of the courts of any of the states to issue any writ, where the proceedings would be tedious and long, to interfere with any part of the army, would produce a most dangerous conflict of powers between the states and the federal government, which would weaken measures for the general defence, and might produce intestine confusion and disorder, inimical to our social peace and happiness.

JUDGMENT AFFIRMED.

1815. DECEMBER. Smith vs Robertson.

In trover for a bond, stated in the declaration to have been executed by B C and A G to the plaintiff—*Held*, that it was competent for the plaintiff to prove, by one of the obligors in the bond, its execution, without producing the bond, if it was in the defendants' possession; and that it was not necessary to give any other notice for the production of the bond, than what was given by the declaration in the action.

SMITH VS. ROBERTSON'S EX'R.

APPEAL from *Prince-George's* County Court. This was an action of trover for sundry bonds executed by *Henry T. Compton* and *Alexander Gibbons*, to the plaintiff's testator, each in the penal sum of $200. The defendant pleaded not guilty, and the act of limitations. And at the trial the plaintiff offered to prove, by *Alexander Gibbons*, the person named in the declaration, the execution and contents of the bonds stated in the declaration, without producing the bonds, or proving that notice had been given to the defendant to produce them. To this testimony the defendant objected. But the Court, [*Johnson*, Ch. J.] admitted the evidence, being of opinion that it was competent for the plaintiff to prove, by the obligor of the bonds, their execution, without producing the bonds, if the same were in the defendant's possession; and that it was not necessary to give any other notice for the production of the bonds, than what was given by the declaration in the cause.

The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and MARTIN, J.

Magruder, for the Appellant. A deed must be produced, if in the power of the party. If he asks that this rule be dispensed with, he must show some circumstances which will authorise the court to dispense with it. If the bond is lost or destroyed, proof of this fact must first be offered. If it is in the possession of the adverse party, notice must be given to him to produce it. 1 *Peake's Evid.* 63. *Waring v Warren*, 1 *Johns. Rep.* 340. If trover is brought for a note or bill of exchange, notice must be given to produce the original, before evidence of its contents is admissible. 1 *Peake's Evid.* 110. In cases where any written paper is the subject of the action of trover, the plaintiff should prove notice to the defendant to produce it. *Ibid* 321. The court below seems to have thought the declaration was sufficient notice. If this is the case, notice would never be necessary in an action of trover. The declaration must describe the bonds or notes said to have been converted, and it is evidence of the nature of the plaintiff's claim, but it cannot be evidence that he wishes the bonds to be produced. Unless the plaintiff

gives notice to the defendant that he requires the production of the bonds, the defendant is not bound to know he will want them, or to be ready to produce them. The plaintiff is himself to take care that he has done every thing which is necessary in order to make out his case.

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Van Horn, for the Appellee. Where the declaration specifies the writing for which the plaintiff goes, (as in this case,) the declaration is sufficient notice. 2 *Esp. Dig.* 513. *The Commonwealth v Messenger*, 1 *Binny's Rep.* 273.

JUDGMENT AFFIRMED.

THE BALTIMORE INSURANCE COMPANY vs. M'FADON.

DECEMBER.

A policy of insurance dated in 1799, was effected on the cargo of a vessel bound from B, in the U. S. to A, in the Island of *Cuba*, which vessel was captured, and the cargo lost to the insured. It was proved that the vessel cleared out from B to C, on the continent of *South America*, and proceeded on her voyage to C and not to A, and when captured had a regular clearance for C, together with a bill of lading, invoice and manifest of the cargo, and affidavit to prove the property thereof annexed to the invoice, with a letter of instruction from the insured to the captain of the vessel, relative to the manifest of the cargo, passport, voyage and sea letter; in all of which the voyage was described as a voyage from B to C. The evidence of the captain was, that he sailed from B to A, and with positive instructions from his owners to proceed to A, and he was going direct thereto when he was captured. Evidence was also offered by the assured, that at the time of making the policy, the fact that the vessel had cleared out for C, and had on board the said documents, was known to the assurers—*Held*, that if the vessel did in fact proceed on a voyage from B to A, at the time mentioned, and if the fact, that she had cleared out for C, and had on board the said documents, describing her voyage as a voyage to C, was known to the assurers at the time of making the policy, then the clearance, and the documents, could not in law affect the assured's right to recover.

If the intent and object of the voyage, and the instructions to the master of the vessel, were to proceed with the cargo to A, and there leave the vessel to go to J, a port within the territory of the *French* republic, and under the known and acknowledged authority of *France*, and at J to sell, barter or exchange, or otherwise dispose of, the cargo, or a part thereof, to or with some person at J, or with the proceeds of the cargo to purchase there the whole or a part of a return cargo for the owners, with intent to convey and ship the same on board the said vessel as a return cargo, or part of a return cargo, that then the assured cannot recover. Per *Nicholson*, Ch. J. in the county court.

A promissory note drawn by P, in favour of D, may be set off in an action on an open policy of insurance brought by P against D.

Where a vessel and cargo, after being captured, were libelled as prize and for salvage in the court of vice admiralty, and part of the cargo was sold by virtue of an interlocutory decree of that court for less than the value, according to the invoice and actual price, and the proceeds of sale paid to the assured; and the vessel and cargo were acquitted and ordered to be restored by a final decree, and the vessel and residue of the cargo given up to the assured, who sold the residue of the cargo for less than the value, according to the invoice, and received the same—*Held*, that the assured was entitled to recover, as for a partial loss, for the difference between the sum produced by the sale of that part of the cargo which was sold by the order of the court of vice admiralty, and the actual value thereof at the port of B, where the insurance was effected, but that the assured was not entitled to recover for the difference between the sum produced by the sale of that part of the cargo which was sold by the assured himself, and the actual value thereof at the port of B.

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insured in and by the policy, having on board a cargo of lawful goods to the value of $30,000, and upwards, the property of the plaintiff and *R. Lawson*, and *R. Caton* and *J. F. Kennedy*, all then citizens of the *United States*; that the said brig, with said goods on board, then proceeded on the said voyage, and while in the regular prosecution thereof, on the high seas, afterwards, to wit, on or about the 20th of March aforesaid, was captured and taken, together with the said goods, by a *British* ship of war, whereby the said goods were totally lost to the plaintiff, and *R. Lawson*, *J. F. Kennedy* and *R. Caton*. The defendants then gave in evidence, that the brig *Betsey*, on the said 1st of March aforesaid, cleared out from the port of *Baltimore* for *Carthagena*, on the continent of *South America*, and actually proceeded, on or about that day, on a voyage to *Carthagena*, and not to any port in the Island of *Cuba*; and that the said brig then and there took on board, and at the time of the capture had on board, a regular clearance for *Carthagena*, together with a bill of lading, invoice and manifest, of the said cargo, and affidavit to prove the property thereof annexed to the said invoice, a letter of instruction from the plaintiff to the captain of the said brig relative to the said manifest of the cargo, passport voyage, and a sea letter therefor; in all of which several papers and documents the voyage is described as and declared to be a voyage from *Baltimore* to *Carthagena*. And the defendants read in evidence the said clearance, bill of lading, invoice, affidavit, letter of instructions, passport and sea letter. The defendants further gave in evidence, that at the time of making the said policy, it was, and ever since hath been, the usual and constant practice of the defendants, and of some other insurance companies in the city of *Baltimore*, when applied to for insurance on vessels cleared out for one port, but actually bound to another, to require from the applicants a written communication of the fact of the clearance or ostensible voyage in the order of insurance, or otherwise; and *Alexander M'Kim*, the former president of the *Baltimore Insurance Company*, who among others proved the above usage, being asked by the plaintiff's counsel whether the *Baltimore Insurance Company* would have dispensed with the information being in writing if they had been pressed so to do by the person proposed to be insured, replied, that no case

had occurred to his knowledge, but if such application had been made, strong reasons must have been assigned to have induced the *Baltimore Insurance Company* to acquiesce in the request; all of which is mere matter of opinion on the part of the witness as to what might have been done by the directions of the *Baltimore Insurance Company* upon such application. The plaintiff then read in evidence, by consent, among other evidence of that fact, the following deposition of *William Furlong*, master of the brig *Betsey*, with a paper thereto annexed, and therein referred to, purporting and admitted to be the rough minutes or draft of a letter of instructions from the plaintiff to *Furlong*, of and concerning the said voyage. The deposition of Captain *William Furlong*, taken the 4th of October 1811, stated—"That he sailed out of the port of *Baltimore* some time in March 1799, on board of the brig *Betsey*, as master thereof, bound to *Barracoa*, within two leagues of which he was captured by a *French* privateer, and carried into a port two leagues to the windward of *Barracoa*; was there cut out by a *British* frigate, and carried to *Jamaica*. That he sailed with positive instructions from his owners to proceed to *Barracoa*, and that he was going direct thereto, without any deviation, when he was captured. That he left his letter of instructions, with other papers, in *Jamaica*, and that the paper hereto annexed, marked A, contains the substance of that letter. That his letter of instructions from his owners only spoke of *Barracoa* as his port of destination. He does not recollect whether he had two letters of instructions or not. That his instructions to proceed to *Barracoa* were in writing. That he delivered up to the commander of the *British* frigate the whole of his papers, and that no papers were concealed. That if he had been bound to *Carthagena* he would have been out of the course of his voyage when he was captured by the *French* privateer." *Exhibit A.* "Herewith you," &c. &c. "Should Mr. *Kennedy* not be at *B.* you will call on Mr. *John Richeau*, and in his absence on *P. Casamajor*, and in his absence to Mr. *Boreau*. You will let the brig remain there; get over to *Jeremie*, explain the business of your voyage to *John Ducarneau*, who will suggest the wisest plan for you to move in. Mr. *Casamajor* is our friend, and an upright, intelligent man; he is the second person you will depend on, and can be of more use to you

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than any other in the island. The business of the small vessels are only known to Mr. *Ducarneau* and Mr. *Kennedy*, you will of course let them be disposed of as *Ducarneau* directs. Dispatch is every thing. Herewith you have a letter to Mr. *Kennedy*. You will open and read it, and you will govern yourself, in case of his absence, by our directions to him. Should the intercourse be opened you shall receive the earliest information." The plaintiff also read in evidence the following letter from *Alexander M'Kim* to the plaintiff, dated the 18th of January 1813, *M'Kim* being at that time the president of the *Baltimore Insurance Company*, to wit: "The abandonment of the cargo of the brig *Betsey*, Capt. *Furlong*, offered on the 11th inst. to the *Baltimore Insurance Company*, is rejected. The company are bound by their policy for their proportion of all expenses incurred or to be incurred in the defence of the property, which proportion of expenses they will always be ready to pay on the production of proper vouchers thereof, and any other loss or injury arising under the policy, as soon as the same can be adjusted." The plaintiff also gave in evidence, that at the time of making the said policy, the fact that the brig had cleared out for *Carthagena*, and had on board the documents describing her voyage as a voyage from *Baltimore* to *Carthagena*, was known to the defendants. The plaintiff then prayed the opinion of the court, and its direction to the jury, that if they believed the said vessel did in fact proceed on a voyage from *Baltimore* to *Barracoa* at the time mentioned, and if the fact that she had cleared out for *Carthagena*, and had on board the said documents describing her voyage as a voyage to *Carthagena*, was known to the defendants at the time of making the said policy, then the said clearance, and the documents last aforesaid, cannot in law affect the plaintiff's right to recover. Which opinion and direction the Court [*Nicholson*, Ch. J.] accordingly gave. The defendants excepted.

2. The plaintiff having read in evidence the aforesaid deposition of *William Furlong*, with the paper thereto annexed, and having so read the same to prove that the real voyage of the brig *Betsey* was to *Barracoa*, in the Island of *Cuba*, the defendants read and relied on the said letter and paper to prove, that the master of the brig *Betsey* was in-

structed by the owners of the vessel and cargo, to proceed with the said cargo to *Barracoa*, in the Island of *Cuba*, and there to leave the vessel to go to the port of *Jeremie*, admitted to be a port or place in the Island of *St. Domingo*, in the *West Indies*, near to the port of *Barracoa*, and admitted to have been then, and long before and after, a port or place within the territory of the *French* Republic, and under the known and acknowledged authority of *France*; and at the port of *Jeremie* to sell, barter or exchange, or otherwise dispose of in the way of commerce and traffic, the whole or some part of the said cargo, to or with some person or persons resident at the port of *Jeremie*, or resident at some other port or place within the jurisdiction or under the authority of the *French* Republic; or with the proceeds of the said cargo, or by other means, to purchase from such person or persons, so resident, the whole or some part of a return cargo for the said owners, with intent to convey and ship the same on board of the said brig as a return cargo, or part of a return cargo. And thereupon prayed the opinion of the court, and their direction to the jury, that if the jury should believe the said facts from the said evidence, then the policy of insurance was void. But the plaintiff objected to the said direction, and to the competency of the said evidence for the purpose aforesaid. And the court were of opinion, and so directed the jury, that if they believed the intent and object of the voyage, and the instructions to the master, to be as above stated, that then the plaintiff cannot recover in this action; for he cannot call upon a court of this country to aid him in recovering a compensation for not having succeeded in an attempt to violate the laws of the country. And the court were further of opinion, that competent and sufficient matter had been disclosed by this letter, when connected with the other evidence in the case, to leave this question to the decision of the jury. The plaintiff excepted.

3. The defendants then offered in evidence the following promissory notes given by *John M'Fadon*, & *Co.* and by *Richard Caton* and *John M'Fadon*, & *Co.* to the defendants, in discount or bar of the plaintiff's claim, to wit: One note dated the 11th March 1799, drawn by *John M'Fadon*, & *Co.* and *Richard Caton*, for $3402 75, payable to the defendants, or order, six months after date. Another dated 22d August 1801, drawn by *John M'Fa-*

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don, & *Co.* for $3833 34, and payable as aforesaid nine months after date. Another dated 14th January 1802, for $544 30, drawn by *Richard Caton* and *John M'Fadon*, & *Co.* and payable as aforesaid three months after date. Another dated 19th January 1802, drawn by the last mentioned persons, for $602 50, and payable as aforesaid 15 months after date. Another dated 23d September 1801, drawn as aforesaid, for $1752 75, and payable as aforesaid, fifteen months after date; and another dated July 8, 1799, for $3882 82, and drawn and payable as aforesaid, three months after date. The defendants then proved that the said notes were respectively signed by *John M'Fadon*, & *Co.* and *Richard Caton;* and that *Richard Lawson*, who was the partner of *John M'Fadon*, trading under the firm of *John M'Fadon*, & *Co.* died on the 1st of November 1803; and that *John M'Fadon*, mentioned in the said notes, and the plaintiff, are one and the same person; and that the plaintiff on the 1st of December 1803, having previously committed an act of bankruptcy on the 29th of November 1803, and being then and there a person residing in *Baltimore*, and using the trade of merchandize, by buying and selling in gross, was duly declared a bankrupt within the true intent and meaning of the act of Congress of the *United States*, entitled "An act to establish an uniform system of bankruptcy throughout the *United States*;" and that *Thomas Caldwell* and *August A. Swartze*, were duly appointed assignees of the estate and effects of the said bankrupt, and that the estate and effects of the said bankrupt were and became duly and according to law vested in the said assignees; and that the plaintiff, having regularly complied with the provisions of the said act of congress, obtained his certificate of discharge in pursuance of said act. The plaintiff then gave in evidence, that on the 24th of October 1803, he, the plaintiff, and *Richard Lawson*, by the name of *John M'Fadon*, & *Co.* at *Baltimore*, did assign, transfer and deliver, the policy aforesaid, to a certain *Robert Oliver*, for a valuable consideration; and that on the same day and year the said *Robert Oliver*, for a valuable consideration, did assign, transfer and deliver, the said policy, to a certain *John F. Kennedy*; and that afterwards, on the 25th of October aforesaid, the said *John F. Kennedy*, at *Baltimore*, did assign, transfer and deliver, the said policy, for a valuable consideration,

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to a certain *Joshua Dorsey* and *John Hollins*, who now hold the same, and for whose use this action is brought. The plaintiff then objected to the said notes being admitted in discount and bar as offered by the defendants. And the court was of opinion, that in as much as this was an open policy, and the claim of the plaintiff was for general, uncertain, and unliquidated damages, that the said promissory notes could not be admitted in bar or discount of the plaintiff's action, and therefore rejected them. The defendants excepted.

4. The plaintiff then gave in evidence, that the brig *Betsey* and cargo, after being captured as aforesaid, was carried by the captors into the Island of *Jamaica*, and were there by them libelled as prize, and for salvage, in the vice admiralty court of the said island, and duly claimed on the part of the owners; that a part of the cargo, consisting of flour in barrels, fish in casks and boxes, oil in flasks, and wine in bottles, and of the value, according to the invoice and actual price, of $5000, were sold in the Island of *Jamaica*, and produced the sum of $4000, which sum the plaintiff received; that the said sale took place under and by virtue of an interlocutory decree of the said court of vice admiralty, which decree is contained in the record of the proceedings of the vice admiralty court of *Jamaica*, which he produced in evidence. That after the said interlocutory decree, the said vice admiralty court acquitted the said vessel and cargo, and ordered the same to be restored by a final decree, which said final decree was also offered in evidence. He further proved by the record of said proceedings, that an appeal was duly interposed from the said decree by the libellants, upon which the said vessel and cargo were ordered to be given up to the plaintiff, on his entering into a stipulation to fulfil the final decree on the appeal, which he accordingly did; and thereupon the vessel, and the residue of the cargo, were, pursuant to the last mentioned decree of the vice admiralty court, delivered up to the plaintiff, who thereupon and of his own accord sold a further part of the cargo, consisting of flour in barrels, fish in casks and boxes, and wine in bottles, to the value of $10,000, according to the original invoice; which said last mentioned part of the cargo produced at the said sales the sum of $8000. That the said two

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sums of $8000 and $4000, were then and there received by the plaintiff, and applied to his own use. The plaintiff then prayed the court to direct the jury, that if they believed the said facts, and if the plaintiff, under the sundry opinions of the court, is entitled in their opinion to recover, then he is entitled to recover as for a partial loss on and for the said two parts of the cargo sold as aforesaid, and each of them, by reason and on account of the said deficiency in the sums produced by the sales respectively. And the court directed the jury, that the plaintiff was entitled to recover as for a partial loss for the difference between the sum produced by the sale of that part of the cargo which was sold by the order of the court of vice admiralty, and the actual value thereof at the port of *Baltimore*; but that the plaintiff was not entitled to recover for the difference between the sum produced by the sale of that part of the cargo which was sold by the plaintiff himself, or by his agents, and the actual value thereof at the port of *Baltimore*. The defendants excepted to the first direction of the court, and the plaintiff to the second. The verdict and judgment being for the plaintiff, the defendants appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Pinkney, for the Appellants, contended—1. That the action was not properly brought; that it should have been in the names of the persons interested; and that the release of errors in the *pleadings*, agreed to by the counsel in the cause, did not operate to cure the error. He insisted that this agreement did not apply to the writ. That in the construction of instruments, where technical terms are used, the law gives the meaning.

2. That the plaintiff, being a bankrupt, the action could not be sustained in his name. The assignment of the policy was merely by indorsation; and it is questionable whether a policy of assurance is that kind of instrument, being under seal, which can be transferred by indorsation. In *Pennsylvania*, it has been decided that it cannot; though in *England* the doctrine is otherwise. The assignment should have equal solemnity as the original instrument. If the transfer is not legal, then the interest under the policy is in the assignees, under the act of bankruptcy, and the

action is brought wrong; and if it is legal, and the policy was transferred by simple endorsement, then the suit should have been brought in the names of the assignees under the transfer.

3. That a liquidated claim due from the plaintiff to the defendants, may be set off against an unliquidated demand of the plaintiff against the defendants. He referred to the act of 1785, *ch.* 45, *s.* 7. *Rousset vs. The Insurance Company of North America*, 1 *Binny's Rep.* 429, *(and note.)*

Harper and *Winder*, for the Appellee, contended—1. That there was no defect in the writ, the policy being in the names of *John M'Fadon, & Co.* and all and every other person, &c. so that any person interested therein may bring a suit on it. 2 *Marsh.* 683. The pleadings do not show that any persons but *John M'Fadon, & Co.* were interested. But if there is error in the writ, the release of errors in the pleadings, by a liberal construction of the agreement, will remedy it; and if the declaration states that others were interested, this is expressly released by the agreement—the declaration being part of the pleadings.

2. The question with respect to the assignment of the policy is not open. The plaintiff was merely a trustee, after he had assigned his interest, for the benefit of the persons to whom he had made the equitable assignment, which was not affected by his bankruptcy; and the assignees under the bankruptcy had nothing to do with the trusts of the bankrupt. Whether or not the assignment was made before the bankruptcy, was an issue which the jury found in favour of the assignment. The universal practice is to assign a policy of insurance by simple endorsement, and therefore no particular form is necessary.

3. The set-off may be resisted on three grounds—1st. The act of 1785 does not permit a defendant to offer a set-off in an action for an unliquidated claim. No action is susceptible of a set-off unless where the demand is for a certain sum. 2d. The notes offered to be set off were rejected generally, and if there was any good reason for rejecting them, the judgment of the court below was right, although the reasons for their judgment may not be so The notes offered as a set-off were offered *ore tenus*, the plaintiff therefore could not plead the act of limitations to the notes, but must set it up *ore tenus*. The objection

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against the set-off was general, and one may be now urged which had not been in the court below. 3d. The equitable assignees were not liable to any claim against the assignor without notice, and there was no proof of notice. Upon either of these grounds the judgment of the court below is correct.

Pinkney, in reply. It would not be proper to set off an unliquidated demand, because there would be two distinct issues to try. The defendant's demand must be liquidated, but the plaintiff's need not. The notice of the assignment of the policy should be given by the assignees to the insurers, and not having done so, if the assignment was legal, there is nothing to prevent the set-off for antecedent claims against the assignor. If it were otherwise, great injustice would be done. It is admitted that limitations might have been set up at the trial in bar of the notes, if standing more than three years; but it must be pleaded, or it must appear in the bill of exceptions, that the notes were rejected on that ground; and it not appearing that the rejection of the set-off was because they were barred by limitations, this court cannot notice that the rejection was on any such ground. It has ever been holden that the statute of limitations cannot be relied on, unless it is expressly shown that it is relied on. He cited *Stoddert v Dunlop*, 2 *Harr. Ent.* 490 *Stone v Rafter*, 1 *Harr. & Johns.* 364; and *Clarke v Mugruder*, 2 *Harr. & Johns.* 77.

Johnson, J. This is an action brought on an open policy of insurance, in which the plaintiff must not only show that the event insured against has taken place, but also establish the value of the goods insured. Had the suit been on a valued policy, proof to the first point would only have been necessary—the parties themselves having agreed on the amount to be recovered, in the event of a recovery, when the policy was entered into.

To free themselves from the plaintiff's claim, the underwriters produced, by way of discount or set-off, several notes, joint and several, executed by the insured to them. These notes were, by the decision of the court below, rejected, because the policy being *open*, the extent of the plaintiff's claim was *uncertain*—dependant on the real value of the goods insured.

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In all instances of controverted claims on policies of insurance, the demand, in one sense, must be uncertain; for it being a question whether the underwriters are responsible, a decision on that subject must be first obtained, before the extent of the claim presents itself—in the valued policy, that has been agreed on—in the open policy it must be established by proof. It is then on account of the uncertainty as to the extent of the claim, and not the uncertainty of the claim itself, that the notes were rejected; for as the decision appears to be founded on the policy being open, had it been valued, a contrary decision would have been pronounced.

This is the first time, within my recollection, where this question has presented itself for the decision of this court, and it must depend on the true construction of the act of 1785, *ch.* 46, in virtue of which the discounts were attempted to be made.

It would seem but just that mutual claims should be set off, one against the other; that neither should be compelled to pay, when the sum so paid must be refunded on a judgment rendered on the adverse claim. Reasonable as this is, the common law, (if I may so term it,) excluded all such payments, and the parties were left to their mutual remedies at law by distinct suits, or one of them must resort to a court of equity to have his claim set off or discounted from his adversary's judgment.

In this situation were claims of this description left until the time of *Geo.* II, in the second year of whose reign a law passed permitting "mutual debts between the plaintiff and defendant" to be set off, one against the other. This statute contains no other description as to the nature of the debts, except that they are "mutual"—whether of equal or superior nature as to their origin—whether the one was on a specialty, and the other on a simple contract, made no difference, except the word "mutual" must restrain them to debts of the same nature. The courts having so long rejected defences of this description, after the passage of this remedial statute, they restrained its operation as far as practicable, and would permit no debts to be discounted, except of the same grade. The legislature of *Great Britain* again interposed, and in 8 *Geo.* II, passed another statute permitting discounts, "notwithstanding they were of different natures."

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These two statutes having passed before the separation of this country from *Great Britain*, did or did not form a part of the law of *Maryland* at the time of the revolution; if they did, who can believe the legislature of this state, in the year 1785, would solemnly have passed an act, which was to have no effect? If they did not, as the construction on those statutes was well known, if no more was intended than was embraced by them, can it be conceived that an intelligent legislature would not have adopted the language of those statutes which were known fully to comprehend those objects? But the act of 1785 varies materially from those statutes, and therefore the decision on them, by any rational rule of construction, cannot be solely applied to it.

It has been remarked, that claims, under policies of insurance, as well as claims of every other description, must be uncertain in one sense; that is, whether any claim to any amount exists; if it doth exist, then, and not before, the extent of the claim presents itself. Debts of every description, whether they arise on specialties or simple contracts, are in the same predicament—the instrument must first be proved, or the contract must be proved, before you can examine into the amount of the claim. Nor does it necessarily follow that the instrument, under which the claim is founded, when proved, must disclose on its face the extent of the claim, or that, when resting on simple contract, the contract, when proved, must produce the same result.

Even under the *English* statutes the contract proved is only introductory to the extent of the demand which may be ascertained by evidence not appearing in the contract, and when ascertained, either by confession, or on demurrer to a plea, setting forth such a claim, or by proof, if contested, and in either case is a claim sufficiently certain and ascertained to be deducted from the plaintiff's demand.

In *Fletcher vs. Dycke*, 2 *T. R.* 32, the claim arose from not having done certain work within a certain given time, under a contract, stipulating that for each week after the expiration of the stipulated time, a specific sum was to be paid; the time that had expired was necessary to be averred, and if not admitted, must of course have been proved.

In the case of a simple contract, whether for work and labour done, on a *quantum meruit*, or goods sold on a *quan-*

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tum valebant, the contracts under which the work was done, or the goods sold, must be proved or inferred, and when proved or inferred, yet the extent of the claim rests on other evidence—the value of the work, or the worth of the goods. In the case of an open policy, that being proved, the loss warranted against being ascertained, what remains more to be done than on the *quantum valebant*, that is, to ascertain the value of the goods—in the one instance sold—in the other insured; and, so far as that ascertainment, surely in the one instance, as well as in the other, the extent of the claim is unliquidated. And yet who can doubt but that a set off on the *quantum meruit* or *valebant*, would be allowed.

No reason can be urged why a person who has an uncertain claim should be permitted to recover from him who had a certain demand. If any difference ought to be made it should be in favour of that which is certain; for a great length of time might be necessary to ascertain the one, and perhaps it might totally fail for the want of proof, and therefore it might be unreasonable to compel the certain creditor to await the termination of the uncertain demand on him. But if he thinks proper to retain his certain demand to meet that which is uncertain, why should he be prevented? He ought not to be prevented, unless the act positively directs it. Recur to that act, and not a word is to be found on the subject of liquidated or unliquidated claims, or debts of any description; its language is general, "that in case any suit shall be brought on any judgment, or on any bond, or other writing sealed by the party, and the defendant shall have any demand or claim against the plaintiff, upon judgment, bond, or other instrument under seal, or upon note, agreement, assumpsit, or account proved, as by this act is allowed the defendant, or otherwise according to law, shall be at liberty to file his account in bar, or plead discount to the plaintiff's claim, and judgment shall be given for the plaintiff for the sum only which remains due after just discount made; provided the sum which shall remain due, after such discount, be sufficient to support a judgment in the court where the cause may be tried, according to its established jurisdiction; *and in all cases of suits upon simple contracts, the defendant may file an account in bar, or plead discount of any claim he may have against the plaintiff*, proved as aforesaid, or otherwise

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proved according to law, *which may be of an equal or superior nature to the plaintiff's claim*, and judgment shall be given as aforesaid."

As the courts have adjudged that their jurisdiction remained, without regard to the sum found due, on all contracts not expressly found to be within the act limiting the jurisdiction, the proviso in the act of 1785, *ch.* 46, s. 7, it is said, must restrain the general expression in the enacting part of that act, and confine it to such contracts, the jurisdiction over which depended on the amount of the claim. In construing every instrument of writing the whole must be taken together, and no interpretation, if possible to be avoided, should be given, that tends to render any of the provisions nugatory, much less the whole of them; and we have seen, that restraining the words of the act of 1785, so as to exclude the discounts in question, would make the general and comprehensive expression of that act useless, by limiting the right to discount to those cases that had been provided for by the statutes of *George*, or by the act of this state passed in 1729, *ch.* 20, s. 5. If, therefore, we were driven to the necessity of excluding all effect to any part of the act of 1785, the proviso must yield to the enacting part, and not it to the proviso. But in giving the opinion which has been pronounced, no such dilemma presents itself For if the jurisdiction of the court on *some* contracts depends on the sum found due, and on others the authority remains to adjudicate without regard to the sum, then it follows, that on all such contracts, where the jurisdiction rested on the sum due after the discounts made, if those discounts reduced the claim below the jurisdiction, the judgment must be for the defendant; but where the contract, on which the suit was brought, was of a different description, there the plaintiff must have judgment for the sum due, without regard to the amount. And whether the contract sued on was of the one description or the other, must be determined by the court, as it has to do in all cases where the sum found due by a jury, or otherwise, is under the ordinary limits.

By a liberal and extensive construction of the act, the object and policy of the law is advanced by enlarging the description of those claims against which discounts were to be admissible; and if it is not just to permit one man to recover a sum of money from another, to whom he is

liable for a like sum, so is justice promoted by extending the power of discount. For if the right to discount does not exist, then it is in the power of a person who has a claim, to transfer that claim, and enable the transferree to recover the sum due, notwithstanding he, from whom the claim was obtained, never could have forced a payment of the money; for in his hands, either at law or in equity, it must have been subject to all demands on contract against him, whether those demands arose on contracts even between the same, or other persons. But if the defendant is not permitted at law to discount, neither could he, it is apprehended, have redress in equity, where the claim had been transferred to a third person, who had no notice at the time he received the assignment. A more striking instance of the injustice of restraining discounts cannot be conceived, than the case now before the court presents. The underwriters having fixed, ascertained, and just claims on the assured, must notwithstanding be compelled to pay the money to his assignees, when the assignor himself could never have coerced the payment; for against him, most assuredly, at equity, relief might have been obtained, and the one demand set off against the other. By permitting the discounts at law his assignees will, as they ought, stand in his place, and be liable to the same objections against the payment of the money that might have been made against their assignor.

The Court concurred in the opinions of the County Court in the *first* and *fourth* bills of exceptions, and dissented from that in the *third* bill of exceptions. The *second* bill of exceptions having been taken by the plaintiff below, did not come under the consideration of the court.

Buchanan, J. dissented from the opinion given by this court on the *third* bill of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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TAYLOR & WARREN vs. FERGUSON & ROBERTSON.

Taylor & Warren vs. Ferguson & Robertson

A bill in chancery charged that the complainants, by letter, instructed the defendants, as their agents, to cause an insurance to be effected for them on a vessel then on a voyage, &c. which the defendant neglected to do, and the vessel was lost. The prayer of the bill was, that the defendants discover on oath, the matters resting in their knowledge, &c. and that they might be decreed to pay to the complainants the sum of money so by them directed to be insured on the vessel, with interest, &c.—*held*, that the relief prayed by the bill is a matter not properly cognizable in a court of chancery, and that that court had no jurisdiction further than to compel the discovery which forms one of the objects of the bill, and that for the rest, the complainants ought to be left to their remedy at law.

APPEAL from a decree of the Court of Chancery. The bill of the complainants, (now appellants,) stated, that they on the 30th of March 1802, being then engaged in commerce and shipping in *Norfolk*, in the state of *Virginia*, and possessed in their right of a ship called *The Fox*, of the value of $4000, and supposed by them to be on a voyage from *Kingston*, in the Island of *Jamaica*, to *Port Republican*, and from thence to *Norfolk*, and wishing to make insurance on the said ship to the amount of her said value, *Taylor*, one of the complainants, wrote a letter of the above date to the defendants, (the appellees,) who then carried on trade in the city of *Baltimore*, and were the complainants' regular agents and correspondents in that city, for making insurance, and every other business of a commercial nature which they had occasion to transact there, containing this request, viz. "I wish to have insurance effected from *Jamaica* to *Port Republican*, and from thence to *Norfolk*;" which letter was duly received by the defendants, and acknowledged by them. That having, soon after the date of the said letter, received intelligence, as the fact was, that the ship, instead of going to *Jamaica*, had proceeded to *Jeremie*, and was about to return from thence to *Norfolk*, by the way of *Cape Francois*, and wishing to accommodate the insurance to be made on her to this new voyage, the said *Taylor* did, on the 6th of April 1802, address to the defendants, and put into the post office at *Norfolk*, a second letter of that date, as follows, viz. "I wrote you on the 30th *ultimo*, directing insurance on the ship *Fox*, from *Jamaica* to *Port Republican*. I find, instead of proceeding to that port, they went to *Jeremie*, where I have heard of their arrival. From thence they will proceed to *Cape Francois*, at which port she has a cargo to discharge, which was taken in at *Jeremie*. You will therefore please to have these things mentioned in the policy. From *Cape Francois* she will come to *Norfolk*." The bill then charged, that the defendants received the said last mentioned letter in due course of post, but as the receipt of it by them is a matter resting in their private knowledge, which they always avoided acknowledging, and now deny, the complainants have no method of establishing the fact of the said receipt, except by a discovery, by the defendants, on

oath. That the defendants wholly neglected and omitted to procure insurance on the ship, according to the directions contained in said letters; and also omitted and wholly neglected to give the complainants any information respecting such omission and neglect, or in any manner respecting the said insurance, so as to enable them to apply for and procure it through some other channel; whereby they were prevented from making, or procuring to be made, any insurance on the ship, being well satisfied, from all the circumstances stated above, that it had been procured by the defendants pursuant to their said directions. That the ship was cast away, and wholly lost, during her said voyage from *Jeremie* to *Norfolk*, through stress of weather, and the danger of the seas, of which event they received the first intelligence on the 15th of April 1802. That they well hoped, and frequently requested, in a friendly manner, of the defendants, that they, having taken on themselves the insurance of the ship, by their aforesaid neglects and omissions, would forthwith, on receiving information of the loss, pay to the complainants the amount of the insurance so by them directed to be made, after deducting the usual premium at that time paid for insurance on such a voyage. But the defendants utterly refused to comply and pay to the complainants any part of the said insurance—falsely pretending that they did not receive the complainants' said letters. *Prayer* for a discovery, on oath, of matters resting in the knowledge of the defendants, &c. and that they may be decreed to pay to the complainants the sum of money so by them directed to be insured on the ship, with interest, &c. and for further relief, &c. The *answer* of the defendants admitted the receipt on the 6th of April 1802, of the letter of the 13th of March 1802, and that on the 7th of April 1802, they applied to the *Baltimore* Insurance Company to make insurance on the said ship for the voyage stated in that letter, but no insurance was effected on said voyage, because it was then known to the said office that the ship had sailed from *Kingston*, and had arrived at *Jeremie*, of all which they informed *Taylor*, one of the complainants, by letter, bearing date on the 7th of April 1802. They admit the receipt of the letter of the 6th of April 1802, but they cannot ascertain the precise period at which it was received, but suppose it to have been about the 13th of that month. That the said letter, immediately after its

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receipt, was mislaid, and was not found or remembered until about the beginning of May 1802, and not until accounts had been received of the loss of the ship. They averred that the ship was not lost on the voyage from *Jeremie* to *Norfolk*, but that she was lost at *Jeremie*, and before she had completed her lading at that port. That the ship was not wholly lost to the complainants, but that materials to the amount of $1000 were saved to the owners. That *Taylor*, one of the complainants, was indebted to the defendants in the sum of $1672 29. That after the receipt of the letter of the 6th of April 1802, the defendants admit they did not apply for insurance on the said ship, but this omission was the effect of accident, and not of any intention to injure the complainants; and the defendants insisted, that the complainants had not been injured by such omission. That the letter of the 6th of April 1802, referred to a policy supposed to be effected on the voyage described in the letter of the 13th of March 1802. No such policy had been effected; and there was nothing in the letter of the 6th of April 1802, which ordered the defendants to insure the ship at *Jeremie*. If, therefore, the defendants had caused insurance to be effected on the ship from *Jeremie* to *Cape Francois*, and thence to *Norfolk*, a loss *at Jeremie* would not have been covered by the policy. The defendants consider themselves well warranted in availing themselves of this objection, which would have protected the underwriters if a policy had been effected. That the letters of the 30th of March, and 6th of April 1802, were written by *Taylor*, one of the complainants, and the defendants did not know, neither did they believe, the said ship was the joint property of the complainants. They deny that the order was in effect an order to insure the interest of both the complainants, or that it ought to have been, or was so understood, at the time of receiving it by the defendants; but on the contrary it amounted only to an order to insure the interest of *Taylor*. That if the insurance had been effected according to the order, and a loss had accrued, which was covered or protected by the policy, nothing more than *Taylor's* interest could have been recovered.

It was admitted by an agreement between the parties, that the ship was at the time of the voyage and loss, of the value of $4000, and was lost at *Jeremie*,

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as stated in the answer of the defendants, by the dangers of the sea. The account of the defendants against the complainant, *Taylor*, was admitted to be just. The materials saved from the ship, after deducting expenses, amounted to $198. The cause was submitted to the chancellor on the bill, answer, exhibits and admissions.

Kilty, Chancellor, (September term 1809.) The object of the bill is to compel the defendants to pay to the complainants the amount of insurance directed to be made, but which they had neglected to make. It is obvious that this is a matter proper for an action on the case at law. The reasons assigned for coming into this court are, that the complainants had no evidence of the delivery of their second letter of the 6th of April 1802. That the receipt thereof rested in the private knowledge of the defendants, which they always avoided acknowledging, and then denied. The prayer of the bill is, that they may set forth and discover whether they did not receive the letters as charged, and that they may be decreed to pay the sum directed to be insured, after deducting for premium of insurance. The greatest objection to the jurisdiction of this court arises from the nature of the claim, which is not founded upon any agreement, or any matter which can be made the subject of an account, but which can be supported only by establishing that there was a breach of orders, negligence or fraud, on the part of the defendants. If the jurisdiction can be sustained, it must be from the equity founded on the second letter, (on which the remedy at law depended,) being concealed or denied by the defendants, so as to entitle the complainants, not only to a discovery, but to relief by payment of the sum due, although this discovery might have been obtained here in aid of a suit at law. And it is further to be observed, that this point is not contested by the defendants, as will be seen by the agreement to submit the case. But the right of the complainants to relief, if it is to be established in this court, must depend on the decision of the questions of law, and the establishment of matters of fact, which do not appear to be properly determinable by a court of equity, but are proper for the determination of a court and jury; which may be obtained by the trial of issues sent from this court. *Decreed*, that there be tried in *Baltimore* county court

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the following issues, &c. If the counsel for the complainants should be unwilling to have these issues, or any others, tried for the support of the case, and would prefer to risk the dismissal of the bill, the chancellor will proceed to decree accordingly.

The chancellor having been requested by the complainants' counsel to proceed to decide and decree upon the bill, answer and proofs, at December term 1811, he *decreed*, that the bill be dismissed with costs. From which decree the complainants appealed to this court, where the cause was argued before BUCHANAN, NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

Harper, for the Appellants. There were two objections made by the defendants in the court of chancery—1. The right of recovery generally. 2. The right of *Warren*, one of the complainants, to recover, because he was not mentioned in the letter ordering the insurance. He contended that both of the letters were to be taken together. The last letter referred to the first, and they are to be connected. There was no new order for insurance given, but only that new facts were to be stated—to substitute *Jeremie* and *Cape Francois*, instead of *Port Republican*. The true meaning was, that it should be on a voyage from *Jamaica* to *Jeremie*, to *Cape Francois* and to *Norfolk*, so as to cover the vessel during the whole of the voyage from *Jamaica* to *Norfolk*, to and at all the different places where she was to stop. *Jeremie* and *Cape Francois* were substituted as intermediate ports, instead of *Port Republican*, first mentioned. The vessel was covered at *Jeremie*—at all events an insurance from her arrival there. He referred to *Gregory v. Christie*, 1 *Marsh.* 273. *Thompson v. Taylor*, 6 *T. R.* 478. *Horncastle vs. Stuart*, 7 *East*, 400. *Marsden vs. Reid*, 3 *East*, 572.

2. It may be said that the chancellor had no jurisdiction of the case, except to grant the *discovery*. He contended, that the practice of the court of chancery in this state is different from that of the *English* courts. It tends to prevent litigation, and the multiplicity of suits. Unless it be some very peculiar case, the party need not carry it on in two courts. It is a maxim, that a court having jurisdiction in part, has it in the whole; and the practice is, that when the court of chancery once takes a case under

its cognizance, it goes on to give the relief required. It prevents the confounding of two jurisdictions.

Pinkney, for the Appellees. The decree of the chancellor dismissing the bill, is perfectly correct on two grounds—1. A court of equity is incompetent to give relief in this case, the matter being exclusively at law. 2. The complainants have no case on their own showing.

1. This is a claim against agents for breach of orders, and a special action on the case in a court of law only gives the party remedy. Every question involved in the case is a question of law, and involves no one principle with which the court of chancery has cognizance. No case can be shown where chancery has interfered in a case of this nature—breach of duty—breach of orders. The jury are to assess the damages. They are first to ascertain the order for insurance—the extent and injury sustained. It cannot be said that a court of equity has original cognizance of a case like this. There are many cases where the court of chancery has concurrent jurisdiction with a court of law; but there are cases exclusively cognizable in a court of law, and such is the present case. There was no demand in the bill, except the discovery, which the court of chancery has any thing to do with. The complainants alleged that they could not prove the receipt of the letters, and called on the defendants, in chancery, to state whether they had not been received. This gave them no pretence to proceed on in their case there. All they had a right to ask was for a discovery of the fact of the receipt of the letters. The question then is, that in a case exclusively applicable to a court of law, and where a discovery is wanting, whether the party can transfer the case from a court of law to a court of equity, and ask for relief? There never was such a case in chancery. The practice is to bring the suit at law, and then apply to chancery for a discovery, to be used in the trial at law. There can be no relief in equity where there is full and adequate remedy at law. There is a single exception—for the specific performance of a contract, but the relief is different. In the one court the contract is to be specifically performed, but in the other damages are given. But here there is no pretence that the relief would be different in equity from what it would be at law. Here the claim sounds altogether in damages; and to ascertain the damages, must be by the

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verdict of a jury. How could the chancellor assess the damages? He must send issues to be tried by a jury in a court of law, otherwise it would be drawing from the jury that which exclusively belongs to them, and which would be attended with dangerous consequences. There is no ground alleged for the jurisdiction of chancery, but the defect of evidence; but that may be remedied by the discovery. It is supplied on the coming in of the answer. The moment the fact is disclosed, the object is attained, and that court is *functus officio*, and the case is for a court of law. The case is so clear, that it is wholly unnecessary to refer to any authorities. This point was fully discussed in this court in *West vs. Beanes*, 3 *Harr.* & *Johns.* 568. The agents have failed to perform the complainants orders. They may have mislaid the letters. There is no fraud alleged, and it is a case strictly at law, and would be a most extraordinary subject for a court of equity. It is a case that at law relief would with reluctance be granted. How then in chancery can there be relief?

2. From the letters, the insurance could not be made—no valid policy could be effected. If it had been effected under the first letter, it would have been void—the deviation from *Port Republican* to *Jeremie* would have annulled the policy. The letter from the defendants, in answer to that first received, stated that the insurance could not be effected. The vessel was lost at *Jeremie*; and the question is, whether if the insurance had been effected under the last letter, (which was very ambiguous,) it would have covered the property at *Jeremie?* It is an equitable rule that written orders should be clear and explicit. If they are ambiguous, a court of equity cannot be called on for relief. They must not be susceptible of different constructions, so as to bind an agent and benefit the writer. It must be shown that the orders were so clear as not to be misunderstood, so that the agent would be in fault by not giving them a true construction. The first order was for insurance *from Jamaica*—not *at Jamaica.* The second order directs no insurance *at* and *from Jeremie* There are no precise directions except in the first letter, which says it must be on the vessel from *Jamaica* to *Port Republican*, and from thence to *Norfolk*—not *at* and *from* The second order places the insurance, with reference to *Jeremie*, as the first order did when the vessel was at *Jamaica*,

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which was to insure *from* that place. The conclusion is, that the agents were to insure *from Jeremie* in the manner they were directed to insure *from Jamaica*. The policy, if it had been made under the first order, could not be changed by substituting *Jeremie* for *Jamaica*, and *Cape Francois* for *Port Republican*. The policy would have been void. There must have been a new policy. When the first order was received, a part of the voyage had been performed—from *Jamaica* to *Jeremie*. Would it have been justifiable in the agents to make their principal pay a premium on a performed voyage? They might well construe the order to be, that all that part of the voyage which was performed was out of the case. This was such a construction which they might give without making them liable under such an order. If they were mistaken, it was such a mistake as an honest man might well fall into. They were as much bound to save premium as they were to insure. Who is to suffer by an ambiguity? Surely he who uses it. The agents were not bound to comply with the orders, because of their ambiguity. *Moore vs. Morgue*, *Cowp.* 479. The second order does not prescribe how the insurance was to be effected. Facts were to be substituted; and suppose they had been substituted, what effect would they have? It is not a clear case that the first order was to insure the vessel *at Jeremie*. The cases cited were cases for freight, and they do not go clearly to decide that if the insurance was from one place to another, and then to another, without saying *at*, and the loss was at one of the places, that the insured could recover. To recover against the defendants it must be shown, that if the insurance had been effected, the complainants could have recovered against the underwriters.

The opinion of the court was delivered by

Buchanan, J. It is the opinion of the court, that the relief prayed for in the bill of complaint in this case, is a matter not properly cognizable in a court of chancery, and that that court had no jurisdiction further than to compel the discovery which forms one of the objects of the bill; which being obtained, the complainants ought to be left to their remedy at law. And therefore, without inquiring into the correct interpretation of the letters, which are alleged to have been written to the defendants by one of the

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complainants, or expressing any opinion as to their legal effect and operation, in which there would be no propriety, that being a subject proper for the consideration of another tribunal, the decree of the chancellor is affirmed.

DECREE AFFIRMED.

DECEMBER. CHASE VS. TAYLOR.

W T drew a foreign bill of exchange dated the 27th of April 1807, on W L, in favour of T C, payable at 60 days after sight; which bill was on the 6th of June 1807 presented for acceptance and refused, and so noted by a notary public, but no protest was ever made for non acceptance. W L at that time and afterwards, and on the 8th of August 1807, when the bill became due, had funds in his hands belonging to W T more than sufficient to pay the bill, and he was in good credit up to the 8th of August 1807, when he became a bankrupt. The bill was presented for payment, and no demand of payment from W L, and no protest for non payment were made until the 17th of November 1807. No notice was given to W T of the non acceptance, and the non payment was not made known to him until some time in 1808. On the 27th of August 1807, W T, being much embarrassed in his commercial concerns, but having very considerable property in ships, &c executed certain bills of sale in trust, &c. and on the 11th of September 1807, he executed one on the ship O, to T C, in trust, &c. On the 20th of September 1808 he satisfied the first mentioned bills of sale, and received a reconveyance. T C about that time pressed W T to settle an account, he claiming a large balance to be due to him, in which the bill of exchange was an article of charge, together with interest, damages and costs thereon On the 27th of September 1808, the said account was settled, and W T paid to T C in cash, and notes, which were afterwards paid, the balance due on the said account. T C had declared to W T before the said settlement and payments, that he would not release his right under the deed of the 11th of September 1807, unless W T would settle the said account, and pay or secure the balance. In an action by W T against T C for money had and received—*Held*, that if W T, at the time of making the settlement of the 27th of September 1808, was ignorant of the fact that the bill of exchange had not been protested for nonacceptance, then the whole settlement was formed in mistake, and was not obligatory on W T. or if W T was then apprized of the said fact, but made the settlement, and gave the notes, in order to induce T C to relinquish his said lien on the ship O, which T C otherwise refused to do, then the settlement, payment and notes were not voluntary, and did not bind W T That if the settlement was made by W T under an ignorance of the fact of nonprotest of the bill, or for the purpose of inducing T C to relinquish his said lien, which otherwise he refused to do, and that in the settlement the cash payment then made was intended by the parties to apply to the said bill, then W T was entitled to recover back so much of the said money as was paid on account of the said bill, except that proportion of the bill which was receive by him of W L's estate. And if in the settlement, the notes given were intended by the parties to apply to the said bill, and that before the time of paying the notes, W T was still ignorant of the fact that the bill had not been protested for acceptance, then the payment of the notes was by mistake, and did not bind W T. And if the notes were intended by the parties to apply to the said bill, and at the time of taking them up W T was apprised of the fact that the bill had not been protested for non acceptance, but that he so took them up for the sole purpose of inducing T C to relinquish his lien on the ship, then the payment of the notes was not voluntary, and did not bind W T.

If W T, after he was informed of the irregularity in the protest of the bill of exchange for non payment, and of the non protest for non acceptance, and had taken up the bill, made a claim against the estate of W L therefor, and it was allowed by the commissioners of W L's estate. and a dividend allowed, and received by W T, it will not prevent W T from recovering from T C the balance paid by him on account of the bill, deducting such dividend.

No evidence can be given of the protest of a foreign bill of exchange for non acceptance, without producing the pretest itself, or a copy from the books of the notary, or proving that the books and the original protest are lost.

Appeal from *Baltimore* County Court. This was an action of *assumpsit* for money had and received. The general issue was pleaded.

1. At the trial the plaintiff, (now appellee) read in evidence a bill of exchange drawn by him according to the custom of merchants, on the 27th of April 1807, in favour of the defendant, upon one *William Lees*, merchant at *Liverpool* in *England*, for £1000 sterling, payable sixty days after sight. And further offered evidence to prove, that the said bill of exchange having been received by the defendant, was by him transmitted to one *Thomas Slater*, his

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correspondent at *London*, for the purpose of being presented and paid; that the bill was accordingly presented to *Lees*, at *Liverpool*, for acceptance, on the 6th of June 1807; that *Lees* refused to accept it, and that it was noted for nonacceptance by the notary who presented it, but that no protest was then, or at any time afterwards, made for or on account of the said nonacceptance; that *Lees*, at the time of the said presentation, and from that time until the bill became due and payable, and afterwards, had in his hands effects of the plaintiff, over and above all other demands, more than sufficient to pay and satisfy the bill; and that at the time of the drawing the bill, the plaintiff had shipped to *Lees* a valuable cargo belonging to the plaintiff, which before the bill was presented had arrived at *Liverpool*, and had been received by *Lees*, and was in his possession as the property of the plaintiff, when the bill was presented, and formed a part of the said effects, and was in itself much more than sufficient to pay and satisfy the bill; that *Lees* sold and disposed of the said cargo, for the use and as the property of the plaintiff, between the time of the presentation of the bill, and the 8th of August 1807, when it became due, and had the same, with more effects of the plaintiff, in his hands, when he, *Lees*, became a bankrupt on the said 8th of August, up to which time *Lees* was in good credit. That the said bill was not presented for payment, and that no demand of payment from *Lees*, who continued to reside at *Liverpool*, and no protest for nonpayment was made, until the 17th of November 1807, more than three months after the bill was at maturity. That no notice was given to the plaintiff by or on behalf of the payee of the bill of the said nonacceptance; and that the nonpayment of the same was not in any manner made known to him until sometime in the year 1808. That on the 17th of August 1807, the plaintiff, being much embarrassed in his commercial concerns, but having very considerable property in ships and merchandize, and being pressed by creditors, duly made and executed to the persons therein named the following deeds for the ship *Orozimbo*, and her cargo, viz. A bill of sale of the ship *Orozimbo*, to *George Salmon*, *William Winchester*, *Ralph Higginbotham*, and *James Cox*—consideration $50,000, dated 17th of August 1807; and a deed of trust to the same persons—consideration $42,495 14,

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for the cargo, &c. of the ship *Orozimbo*, dated on the same day; and also a deed for the cargo of the *Orozimbo* to the defendant, and *Joseph Sterett*, on the 11th of September 1807, which should remain after satisfying the trusts mentioned in the last above mentioned deed, to pay the defendant $17,500, the amount of negotiable paper loaned by the defendant to the plaintiff; and to pay *Joseph Sterett* $5,000, &c. The plaintiff further gave in evidence, that on the 9th of September 1808, the ship *Orozimbo* arrived in the port of *Baltimore*, with a very valuable cargo on board; and that on the 20th of the same month, he was enabled, by the assistance of a friend, to satisfy the claims mentioned in the two deeds dated the 17th of August 1807, and received a reconveyance of the ship and cargo therein mentioned, which he gave in evidence. That about the same time the defendant pressed the plaintiff to settle an account, in which he claimed a large balance to be due to him, and in which the said bill of exchange was an article of charge, together with interest, damages and costs thereon. The account was as follows:

Dr. *Wm. Taylor*, in ac. current with *Thorndick Chase*, Cr.

1807.		
Sept. 19. To amount of sales of 103 hhds. tobo. &c.	10,049	16
1808.		
Sept. 13. To bill of exchange returned from London under protest, and charges, &c.	5,683	31
To, &c. &c. amounting in all to	18,950	18
By credits, &c.		
By balance due,	12,283	56
To balance due,	$12,283	56

That on the 27th of September 1808, the plaintiff settled this account with the defendant, and paid to him in part discharge of the balance appearing to be due, the sum of 6,327 97, and gave him his notes for the remainder, amounting to to $5,950, which notes he gave in evidence. He also gave in evidence that the said notes were afterwards, in the months of May, August and September 1809, paid in full by plaintiff to the defendant, that at the time of making the said settlement, and payment and giving the said notes, on the 27th of September 1808, the

plaintiff was wholly ignorant that the said bill of exchange had not been protested for nonacceptance, or that payment had not been demanded, or protest for nonpayment made, sooner than the 17th of November 1807; that he had not then received notice from the defendant of the time when the said bill was presented for acceptance, or that acceptance had been refused as the law required. That the defendant had declared to the plaintiff, before the said settlement and payment were made, and the said notes given on the 27th of September 1808, that he would not release his right under the deed of the 11th of September 1807, unless the plaintiff would settle the aforesaid account, and pay or secure the balance; that the said bill of exchange was not shown to the plaintiff at the time of the said settlement, but that the defendant promised to send it to him, and did send it a few days afterwards; and that when the plaintiff had examined it, and the protest annexed to it, (which protest he offered in evidence dated the 17th of November 1807,) he complained to the defendant, that he had been induced to pay a bill for which it now appeared he was not liable, and observed, that the defendant ought to refund it; to which the defendant replied, that if the money could be recovered at all, he ought not to be sued for it. That when the said settlement and payment were made, and the said notes were given on the 27th of September 1808, the defendant required from the plaintiff two bills of sale to secure the payment of the said notes, one of which bills of sale conveyed to the defendant a moiety of the ship *Fame*, and the other conveyed to him the ship *Roboreus*, as expressed in the receipt or acknowledgment given by the defendant for the said bills of sale, which receipt the plaintiff gave in evidence. That upon the said bills of sale being executed and delivered to him, the defendant, and *Joseph Sterett*, released and reconveyed to the plaintiff the property mentioned in the deed from the plaintiff to them of the 11th of September 1807, which release the plaintiff read in evidence. And that the defendant held the said bills of sale of the *Fame* and *Roboreus* until the aforesaid notes were fully paid. The plaintiff further offered evidence, that he was ignorant of the want of a protest for the nonacceptance of the aforesaid bill of exchange, when he paid and satisfied the said notes; and that while the said ships *Fame* and *Roboreus* were ly-

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ing at the port of *Baltimore*, and the said bills of sale were in the possession of the defendant in full force, the plaintiff, for the purpose of transporting a certain quantity of coffee, part of the said cargo of the ship *Orozimbo*, to the continent of *Europe*, chartered the three following vessels; that is to say, the *Leda*, *Richmond*, and *Dolphin*, and did actually pay for the freight of said property the sum of $15,000, and upwards. The defendant then gave in evidence, that at the time when the settlement of the 27th of September 1808, was made, the plaintiff had been informed, and did know, that the said bill of exchange had been presented for acceptance to *Lees*, on the 6th of June 1807, and that the acceptance thereof had then been by him refused, and that the said bill had not been protested for nonacceptance by or for the defendant; and also had been informed, and did know at the time of the said settlement, that the said bill was not protested for nonpayment until the 17th of November 1807; and that neither at the time of the said settlement, nor at any time before, did the plaintiff in any manner object to the payment of the said bill with damages and interest, but offered to secure the payment thereof, and that the only difference between him and the defendant, at the time of, and before the settement, was about the nature of the security to be substituted by the plaintiff instead of the lien on the cargo of the *Orozimbo*, then held by the defendant; and that the said payment and settlement, and also the payment of the said notes, were voluntary on the part of the plaintiff, and made with a full knowledge of the undue delay in protesting the said bill for nonpayment, and of the nonprotest thereof for non acceptance. The defendant also gave in evidence, that on the 8th of August 1807, when the said bill became payable, *Lees* became bankrupt, and was duly declared bankrupt according to the laws of *England*; and that the plaintiff afterwards, and after he had made the said settlement and payment of the 27th of September 1808, and before he had paid the said two notes then given, did present his account against the estate of the said bankrupt, to the assignees and commissioners of the said bankrupt, which account included the sum so paid to the defendant for principal, damages and interest, on the said bills, and was passed by the said commissioners, by whose order a dividend of 7*s* 6*d* sterling in the pound on the said account was paid to the plaintiff, and received by him before the commencement of this action. And also gave in evidence, that the defendant did not at any time take, and never had or threatened to take, any actual possession either of the cargo of the *Orozimbo*, or of the said ships *Fame* or *Roboreus*, or either of them, and that all of them remained in the actual possession of the plaintiff. And also gave evidence to prove, that the plaintiff sustained no actual loss or damage from the failure of the defendant to cause the said bill to be protested for nonacceptance, or to give notice thereof to the plaintiff, or from the delay of the defendant to cause the said bill to be presented for payment in due time, and to

be duly protested for nonpayment. He also gave evidence to prove, that the cash payment made on the 27th of September 1808, was intended by the plaintiff and defendant to apply to the parts of the said account due for matters other than the said bill of exchange, and that the said two notes were intended to apply to the part of the said account arising from the said bill of exchange; which evidence arises wholly from the papers, facts and circumstances, stated above. The plaintiff further offered evidence, that he sustained loss by the omission of the defendant to cause the said bill to be protested for nonacceptance, and to give notice thereof to the plaintiff, and also from the delay of the defendant to cause the said bill to be presented for payment, and protested for nonpayment. The plaintiff further offered evidence, that the cash payment made on the 27th of September 1808, was not intended by the plaintiff and defendant, or either of them, to apply to the parts of the said account, other than the said bill of exchange, but that the said payment was intended to apply, in the first instance, to the said bill of exchange; which evidence also arises wholly from the facts and circumstances stated above. The plaintiff then prayed the opinion of the court, and their direction to the jury, that if they believe the facts so given in evidence by the plaintiff, and that at the date of the settlement of the said account on the 27th of September 1808, he was ignorant that the said bill of exchange had not been regularly protested for nonacceptance, or that the same was not presented for payment at the regular time of the payment thereof, after the said presentation for acceptance, and protested for nonpayment; or if they believe that the plaintiff, at the settlement of the said account, had knowledge of the said facts, but that the defendant refused to release the power or control which he possessed over the cargo of the *Orozimbo*, unless the plaintiff settled the said account, and gave the promissory notes, and bills of sale for the ships *Fame* and *Roboreus*, to the defendant, then the plaintiff is entitled to recover in this case. This opinion the Court, [*Nicholson*, Ch. J. and *Hollingsworth* and *Bland*, A. J.] refused to give; but were of opinion, and so directed the jury, that if in their opinion the plaintiff, at the time of making the settlement of the 27th of September 1808, was ignorant of the fact that the said bill had not been protested for nonacceptance, then the whole settlement was formed in mistake, and was not obligatory on the plaintiff; or if the jury should be of opinion, that the plaintiff was then apprized of the said fact, but made the said settlement, and gave the said notes, in order to induce the defendant to relinquish his said lien on the cargo of the *Orozimbo*, which the defendant otherwise refused to do, then the said settlement, payment and notes, were not voluntary, and do not bind the plaintiff. And if the jury should be of opinion, that the said settlement of the 27th of September 1808,

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was made by the plaintiff under ignorance of the said fact of nonprotest, or for the purpose of inducing the defendant to relinquish his said lien, which he otherwise refused to do, and that in the said settlement the cash payment then made was intended by the parties to apply to the said bill of exchange, then the plaintiff is entitled to recover back in this action so much of the said money as was paid on account of the said bill of exchange, except that proportion of the said bill which was received by him of *Lees'* estate at *Liverpool*. And if the jury should be of opinion, that in the said settlement, the notes given as aforesaid were intended by the parties to apply to the said bill of exchange, and that before the time of taking up the said notes, the plaintiff was still ignorant of the fact that the said bill had not been protested for nonacceptance, then the payment of the said notes was by mistake, and does not bind the plaintiff. And the court was also of opinion, that if the said notes were intended by the parties to apply to the said bill of exchange, and at the time of taking them up the plaintiff was apprized of the fact that the said bill had not been protested for nonacceptance, but that the plaintiff so took them up for the sole purpose of inducing the defendant to relinquish his lien on the ships *Fame* and *Roboreus*, then the payment of the said notes was not voluntary, and did not bind the plaintiff. The defendant excepted.

2. The defendant, to prove that the said bill of exchange had been duly protested for nonacceptance, offered in evidence the memorandum noted, viz. "6th June 1807, *John Irvin*, N. P." which he offered to prove was made by a notary public in *Liverpool*, at the foot of the bill; and also for the same purpose proved that the said notary is now dead, and has been for some time past, and that it is the usual course, in relation to bills of exchange, to protest them for nonacceptance as soon as they have been noted for nonacceptance. The defendant then prayed the opinion of the court to the jury, that if the jury should be of opinion that the bill of exchange was presented for acceptance on the 6th of June, and was duly noted and protested for nonacceptance, and that the plaintiff was in due time informed of the said notation and protest, although the said protest was never shown to him, then that the omission to protest the bill for nonpayment, when according to its tenor it became due, did not exonerate the plaintiff from his legal responsibility on the bill. But the court were of opinion, and so directed the jury, that the defendant cannot give any evidence of the protest of the said bill for nonacceptance, without producing the protest itself, or a copy thereof from the books of the notary, or proving that the said books, and the original protest, are lost, and therefore refuse the direction prayed. The defendant excepted.

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3. The defendant then prayed the opinion of the court, and their direction to the jury, that if they believe that the plaintiff, after he was informed of the irregularity in the protest of this bill of exchange for nonpayment, and of the nonprotest thereof for nonacceptance, and had taken up the said bill, made a claim against the estate of *Lees*, which claim included the said bill of exchange, and the money paid thereon by the plaintiff to the defendant as aforesaid, and that the said claim was allowed by the commissioners of *Lees'* estate, and a dividend thereon allowed, and paid and received by the plaintiff, then the plaintiff was not entitled to recover in this action. This opinion the court refused to give. The defendant excepted.

4. The defendant then gave in evidence, that on the 10th of June 1807, four days after the noting of the said bill of exchange for nonacceptance, *Lees* wrote and transmitted to the plaintiff a letter, informing him that the acceptance of the said bill of exchange had been refused, and that the ultimate payment thereof was doubtful, which letter was received by the plaintiff in the usual time, and long before the said settlement of the 27th of September 1808, and he gave the letter in evidence. And he then prayed the opinion of the court, and their direction to the jury, that if they believed from the evidence that the said letter was written and received as aforesaid, and that the said bill of exchange was noted as aforesaid for nonacceptance, then the want of a protest thereof for nonacceptance did not in law absolve the plaintiff from his liability on the said bill of exchange, and therefore could not operate to enable him to recover in this action. This direction the court refused to give, being of opinion, that the memorandum on the said bill of exchange was no evidence of the same having been noted for protest; and that to receive other evidence of a protest for nonacceptance, than the protest itself, or a copy of it, except where the original and the record have been lost or destroyed, would be to step over all those rules of the law of evidence by which the commercial world is governed. The defendant excepted.

5. The defendant then prayed the opinion of the court, and their direction to the jury, that if in their opinion the plaintiff, at the time of settling the said account, making the said payment in cash and notes on the 27th of September 1808, or of taking up the said notes, had received no notice of any protest of the said bill of exchange for nonacceptance, and that no such protest had been made at the time of presenting the said bill for acceptance or afterwards, and that the plaintiff, at the time of taking up the said bill of exchange on the 27th of September 1808, by paying the amount in cash and notes as aforesaid, or of taking up those notes as aforesaid, was ignorant of the omission to protest the said bill for nonacceptance, then

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such ignorance does not affect the right of the defendant to retain the money for which this action is brought. But the court also refused to give this opinion and direction. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Earle, Johnson, and Martin, J.

Harper, for the Appellant.

Pinkney and *W. Dorsey*, for the Appellee. They referred to *Astley vs Reynolds*, 2 *Stra.* 915, 916.

The Court concurred with the County Court in the opinions given in all the bills of exceptions.

JUDGMENT AFFIRMED.

December.

Chilton vs. Jones

In an action on the case on a warranty by C, that certain slaves sold to J, were sound and healthy, knowing them to be unsound, &c. the evidence was, that when the slaves were about to be delivered, the agent of J said to C, do you deliver those slaves as sound? He answered, I know nothing of them: I refer you to D; I got them from him; I did not know any thing about them till now. He will deliver them. The agent then said to D, are those slaves sound. To which he replied, they are sound to the best of my knowledge. D then delivered the slaves to the agent. One of the slaves was unsound at the time they were delivered. J offered to give in evidence the declarations of D, made some time before the sale to J, for the purpose of proving that he knew the slaves to be unsound before and at the time of their delivery—*Held*, that the evidence was inadmissible. *Held* also, that the circumstance that the mother of the slaves having died with the king's evil, or scrophula, was not of itself sufficient evidence of the unsoundness of any of her children, to entitle J to recover in this action.

Appeal from *Montgomery* County Court. This was an action on the case. The declaration contained two counts—1. That on the 21st of October 1808, the defendant, (now appellant,) by his bill obligatory, promised and obliged himself to pay to the plaintiff, (now appellee,) £380 8 4, the amount to be paid off, in negroes, to be valued by two persons, as they were selling in 1807. That the defendant, in payment and discharge of the said bill, on the 31st of December 1810, did deliver to the plaintiff certain negroes, and they were delivered and valued, that is to say, a negro boy named *John* at the sum of, &c. which said negroes the defendant undertook, and then and there faithfully promised the plaintiff, were sound and healthy. That the plaintiff, in consideration thereof, delivered up the said bill obligatory. Averment, that the negroes were not sound and healthy, and that the defendant knew them not to be so, but falsely, fraudulently, and craftily, to deceive the plaintiff, did not regard his said several promises, &c. by reason whereof the said negroes were of no use and value to the plaintiff. 2. On a warranty that certain negro slaves sold, &c. were sound and healthy, knowing them to be unsound and unhealthy, &c. The defendant pleaded *non assumpsit*, and issue was joined.

The declaration in the *first* count stated, that C, by his bill obligatory, obliged himself to pay to J £380, the amount to be paid off in slaves to be valued, &c. That C, in discharge of the bill, did deliver certain slaves, and they were valued, &c. which slaves C undertook and promised J were sound and healthy; in consideration thereof J delivered up the bill obligatory—averment, that the slaves were not sound and healthy, and that C knew them not to be so, but falsely, &c. to deceive J, did not regard his promises, by reason whereof the slaves were of no use and value to J. The *second* count was on a warranty, that certain slaves sold, &c. were sound and healthy, knowing them to be unsound and unhealthy, &c. no damages were laid in the declaration—*Held*, that on the evidence above stated J was not entitled to recover on his declaration.

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1. At the trial the plaintiff offered in evidence, that the negroes were sold to him by the defendant for money due from the latter to the former; that by agreement, *R. Lyles* and *J. Sprigg* were to appraise them; that some of the negroes were at the house of *S. Davis*, and were there appraised by the said appraisers, and taken by the agent of the plaintiff at that appraisement. The plaintiff also proved, that after the negroes had been appraised, and were about to be delivered, the agent of the plaintiff said to the defendant, Do you deliver those negroes as sound? The defendant answered, I know nothing of them—I refer you to Mr. *Davis*. The plaintiff's agent then said to *Davis*, Are those negroes sound? To which he replied they are sound to the best of my knowledge, except a burn on one of them, which he showed. *Davis* then delivered the negroes to the agent of the plaintiff. The plaintiff further proved, by another witness, that when the agent of the plaintiff asked the defendant if he delivered the negroes as sound, he replied, Mr. *Davis* will deliver them—I got them from him—I did not know any thing about them till now. The witness further stated, that it pressed upon his mind that the defendant said to the agent of the plaintiff something amounting to this—That he delivered the negroes through Mr. *Davis*. The plaintiff further offered in evidence, that the defendant had said that *Davis* was to furnish negroes to pay a debt due to the plaintiff. The plaintiff also offered in evidence, that one of the negroes above mentioned, was unsound at the time they were delivered. The plaintiff then offered to give in evidence, declarations of the said *Davis*, made some time before the sale to the plaintiff, for the purpose of proving that he knew the negroes in question to be unsound before they were agreed to be taken as above stated, and at the time of their delivery. The plaintiff further offered in evidence, that a memorandum of the names and prices of the negroes so appraised, was given by *Davis* to the plaintiff's agent, who gave it to the attorney for the plaintiff, who copied it exactly in the declaration, and lost the said memorandum. To the admission of which evidence the defendant objected; but the court, [*Harwood* and *Ridgely*, A. J.] were of opinion, that the evidence was admissible, and permitted it to go to the jury. The defendant excepted.

2. The plaintiff then offered in evidence, that the mother of the negroes in question was severely afflicted, and died with the scrophula, and that the witness, who was the family physician of *Davis*, had told him the disorder was hereditary, and that he would not have any of the children; but the witness never knew of any of the negroes in question being sick while in the possession of *Davis*, and never heard *Davis* say they were. The defendant then offered in evidence, by *J. Sprigg*, one of the appraisers, that some time on the day the negroes were so appraised and

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delivered, *Davis* said in the presence and hearing of the plaintiff's agent, that they were motherless children, and he parted from them on that account; and to the best of the witness's knowledge added, that the mother had died with the king's evil, or scrophula. One of the appraisers, at the time of appraising them, knew they were the children of a woman who had died with the scrophula or king's evil, and the other appraiser heard it on the same day, and made no alteration in his appraisement. The appraiser who knew it, did not know it was an hereditary disease, and the other appraiser now considered that it would have made a difference in the valuation if he had known it. The plaintiff proved by two physicians, Doctor *Lyles*, one of the appraisers, and Doctor *Brewer*, that the king's evil was an hereditary disease, and that the children of a parent so diseased, could not, with propriety, be appraised or valued as sound negroes, even though the disease might not have appeared upon them. The defendant then prayed the opinion of the court to the jury, that the circumstance of the mother of the children in question having died with the king's evil, or scrophula, is not of itself sufficient evidence of the unsoundness of any of her children, to entitle the plaintiff to recover in this action; which instruction the court refused to give; but were of opinion, and so directed the jury, that if they believed that at the time of the appraisement and delivery, the negro children were affected, or might be affected, with a latent disease, and that they were not so valuable as if descended from an healthy mother not afflicted with the scrophula, the plaintiff is entitled to recover damages on account of them, although the said latent disease may not have appeared on, at or since, the said delivery. The defendant excepted.

8. The defendant then prayed the opinion of the court, that upon the evidence stated, the plaintiff is not entitled to recover on his declaration. Which opinion the court refused to give. The defendant excepted; and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued before Chase, Ch. J. and Nicholson, Earle, Johnson, and Martin, J.

Taney, for the Appellant, contended, 1. That the declarations of *Davis*, stated in the *first* bill of exceptions, made when he was not the agent of the defendant, ought not to have been received as evidence. It is not stated that *Davis* was present; and as he had no authority at that time to act for the defendant, his declarations could not be evidence to charge the defendant.

2. It was assumed by the court below, in the *second* bill of exceptions, that *Davis* had a right to bind the defendant by a warranty of the soundness of the negroes. The war-

ranty, if made, was that the negroes were sound at the time of their delivery, and not that they were descended from healthy parents. If there was no actual existing disease, the contract was complied with. 2 *Com. on Cont.* 266, 267, cites *Parkinson vs. Lee*, 2 *East*, 314. The court below, by refusing the defendant's prayer, decided, that if the mother was afflicted with, and died of the king's evil, it was sufficient evidence of the unsoundness of the children; and they declared, that if the children *might be affected* with a latent disease, at a *future period*, then the plaintiff might recover. It is denied that the warranty of *Davis* could bind the defendant; and it is contended that the sale was made by the defendant himself. There is nothing in the case which shows that *Davis* was the agent of the defendant. *Pasley vs. Freeman*, 3 *T. R.* 52. The action should have been brought against *Davis*. The plaintiff was referred to him; for the defendant expressly said he knew nothing of the negroes. The opinion of the court below was founded upon a warranty, and not upon a fraud. A mere opinion expressed, is no warranty. If it was intended as an affirmance of the fact, then it might be a warranty. *Ibid.* 57.

3. There are two counts in the declaration. The *first* is on a special contract, and there was no evidence given to prove it; the prayer in the *third* bill of exceptions, that the plaintiff could not recover on it, ought to have been granted. The *second* count is on a warranty that the negroes were sound. There is no consideration stated for the warranty. The sums of money for which the negroes were sold are stated, but it is not said they were paid for. Every declaration should state a sufficient consideration upon which to ground the *assumpsit*. 1 *Chitty's Plead.* 295.

4. The verdict and judgment are for damages; but there are no damages laid in the declaration. It is not necessary to cite authorities to show that this is fatal.

The Court dissented from the opinions of the County Court in all the bills of exceptions.

JUDGMENT REVERSED.

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OWINGS & CHESTON vs. NICHOLSON & WILLIAMS.

Owings & Cheston vs Nicholson & Williams

APPEAL from *Baltimore* County Court. This was an action of *assumpsit* for money had and received, laid out and expended, and lent and advanced. The defendants, (now appellants,) pleaded the general issue.

S W purchased a quantity of flour from O & C, for the payment of which he gave them his promissory note, on the 10th of August 1810, payable 85 days thereafter, and he shipped the flour to *Martinique* on the 18th of August 1810 consigned to S D, where the vessel arrived on the 5th of October. On the 24th of August, while the vessel was prosecuting her voyage, S W assigned the bill of lading of the flour to N and W, to indemnify them as his endorsers on certain promissory notes, which they had paid, being more than the value of the flour. S W, when he assigned the bill of lading to N & W, was wholly insolvent, and was discharged as an insolvent debtor under a special act of insolvency passed in November 1810, but he was in good credit when he purchased the flour. About the last of August O & C sent their agent to *Martinique* to seize the cargo of the vessel, for the purpose of securing the debt due to them He arrived there before the vessel, and caused a suit to be instituted in the court of *St. P*, and when the vessel arrived the cargo was seized and condemned for the amount due to O & C. After this B N, stating himself to be the agent of N & W. instituted counter proceedings in the said court, to which N & W were made parties, and that court definitively decreed a sale of the cargo for the payment of the claim of O & C, the amount of which was paid by S D in pursuance of the said decree, to the agent of O and C, who paid it over to them—*Held*, that it was competent for the agent to give evidence that the money he received from S D was paid in pursuance of the decree of the court of *St. P*—*Held* also, that N & W were entitled to recover from O & C, in an action for money had and received, the sum of money so by them received—*Held* also, that the proceedings of the court of *St. P.* were sufficiently authenticated to be read in evidence, it being proved, by a witness skilled in the *French* laws and in the proceedings of the *French* tribunals, that they were authenticated in the manner used and authorised in the territories and tribunals of *France*. The signature thereto of the chief judge of the said court being proved, and the seal affixed thereto being proved to be similar to that used at the same time as the colonial seal of another *French* island—*Held* also, that N & W could not offer in evidence by B N, that he had no instructions from them to institute any proceeding whatever on their behalf in *Martinique*, and that on his return, and communicating to them what he had done in the court of *St. P* they disapproved and disavowed his acts—*Held* also, that the judgment and proceedings in the court of *St. P.* do not affect the right of N & W to recover from O & C the said sum of money by them received of their said agent.

1. At the trial the plaintiffs, (the appellees,) read in evidence a bill of lading signed by *Henry Yearly*, master of the brig *Hunter*, dated the 18th of August 1810, for the whole of the cargo of the said brig, shipped by *Samuel Wright* at the port of *Baltimore*, and bound to *Martinique*, and there to be delivered to *Silas Marean*. And an indorsement made on said bill of lading by *Wright*, on the 24th of August 1810, while the brig was on the high seas prosecuting her voyage to *Martinique*, whereby, in consideration of the sum of one dollar, he assigned, &c. to the plaintiffs, the bill of lading, and the merchandise therein mentioned. They further gave in evidence, a deed regularly executed, delivered, acknowledged and recorded, from *Wright* to them, dated the 24th of August 1810, being in trust to secure the plaintiffs as endorsers, whereby was conveyed to them a tract of land called *Stratton*, in *Queen-Anne's* county; also the brig called the *Hunter*, together with her tackle, &c. also all and singular the cargo, goods, &c. laden or to be laden on board the said brig, during her then voyage, and all the profits and proceeds thereof, &c. They also gave in evidence, that the brig, with her cargo on board, sailed on or about the 18th of August 1810, on her voyage to the Island of *Martinique*, where she arrived on or about the 5th of October in that year. They further gave in evidence the deposition of *Benjamin Noland*, taken on their part, stating, that he sailed from the port of *Baltimore* on or about the last day of August 1810, to the Island of *Martinique*; that he went out by the order of the defendants, and *Andrew*, *Benjamin*, *James* and *Thomas Ellicott*, or *Elias Ellicott*, but he believes *Thomas Ellicott*, to seize the cargo of the brig *Hunter*, capt *Yearly*, that sailed a few days previously thereto from *Baltimore* to the Island of *Martinique*, with a cargo of flour belonging to *Samuel Wright*. He had a letter to that purpose from the defendants, and the said *Ellicotts*, to seize the said cargo for the purpose of securing debts due to them respectively from *Wright*. He arrived at *Martinique* in September 1810, and before the arrival at that place

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of the brig *Hunter*. He received from Mr. *C. B. Tuttle*, the partner of *Silas Marean*, the consignee of the said cargo, and who was then absent from the Island, the sum of $6700, and upwards, about the last of October 1810, being part of the proceeds of the cargo of the brig *Hunter*, received for the account of the defendants, and the *Ellicotts*. He returned to *Baltimore* in November or December 1810, with the said sum of $6700, and upwards, which he then paid over to the defendants and the *Ellicotts*, on account of their respective claims due by *Wright* to them. He took to *Martinique* with him separate powers of attorney from the defendants, and from *Andrew Ellicott*, and others, which said letters of instructions herein before mentioned, and powers of attorney, he delivered up, according to the best of his recollection, to the parties who gave them to him, but he is not certain whether he delivered the powers of attorney up to the parties, or whether he left them at *Martinique*. The plaintiffs further gave in evidence the agreement signed by the counsel, and annexed to the deposition of *Noland*, in these words: "It is agreed that the annexed deposition be read in evidence in the above cause, so far as the same matters contained are competent and legal evidence." They also gave in evidence, that *Noland*, on his return from the Island of *Martinique* to *Baltimore*, sometime in November or December 1810, paid to the defendants the sum of $735, part of the said sum of $6700, which part was claimed by the defendants as being due to them from *Wright*, by virtue of a certain promissory note from him to them made on the 15th of August 1810, and payable 85 days after date, for $735; which note they gave in evidence. And the plaintiffs, for the purpose of proving the precise sum paid by *Noland* to the defendants, produced *Samuel Sterett*, who proved that *James Cheston*, one of the defendants, did, immediately after the arrival of *Noland*, deliver the said promissory note to the witness, and requested him to deliver it to *Wright*, or his trustees, as they the defendants had received the amount thereof in consequence of an attachment, or some legal proceeding in the *West Indies*; that the witness did go to the counting-house of *Wright*, for the purpose of delivering the said note, but not finding him there, he afterwards presented it to *N. F. Williams*, one of the present plaintiffs, who declined receiving it. The defendants then offered to read in evidence the cross examination of *Benjamin Noland*, taken at the same time with the direct examination, under the agreement of counsel herein before set forth, to wit: "The said *Benjamin Noland* being cross examined on behalf of the defendants upon his oath answereth and saith: *Interrogatory* 1st. When you arrived at *Martinique* did you seize the cargo of the brig *Hunter*, or institute any process against it on the part of the defendants? To which he answers, that when he arrived there he employed a lawyer to seize the cargo, and the lawyer instituted a suit in the court of *St. Pierres*, and when the brig arrived, the cargo

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was seized and condemned for the monies due to the defendants and Messrs. *Ellicotts*. That Mr. *Benjamin Nicholson*, declaring himself to be the agent of the plaintiffs, instituted counter proceedings in the said court, to which the plaintiffs were made parties, and that the court definitively declared a sale of the property for the payment of the claims of the defendants, and *Ellicotts*. That the sum of money the deponent received from Mr. *Tuttle* was paid in pursuance of the decree of said court." To this evidence the plaintiffs objected; but the Court, [*Hollingsworth*, A. J.] was of opinion, that it was competent evidence to prove that the money was paid by *Tuttle*, and that *Noland* received the money in the character, and under the impressions stated in his last mentioned deposition, and no further; and it was read accordingly. The defendants excepted.

2. The plaintiffs further gave in evidence, that the brig *Hunter* was the property of *Wright*, and that on the 15th of August 1810, he was, and during his life afterwards continued to be, a citizen and resident of this state; and that the plaintiffs and the defendants, and the *Ellicotts*, then were and yet are citizens and residents of this state; and that the cargo of the brig *Hunter*, mentioned by *Noland*, is the same cargo of the brig *Hunter*, mentioned and contained in the deed and bill of lading aforesaid. They also gave in evidence, that they, for the accommodation of *Wright*, and without any other consideration or motive, did endorse and draw for *Wright* the promissory notes in the deed of August the 24th 1810 enumerated, which notes were discounted by *Wright* in one of the banks of *Baltimore* for his own use and benefit, and the monies arising therefrom was received by him; and also that the plaintiffs took up and discharged the said notes as they severally became due, before the bringing of this action. They also gave in evidence, that the whole property assigned to them in and by the said deed and assignment, was not sufficient to reimburse them for the sums by them paid in discharge of the said notes. The plaintiff then prayed the court to direct the jury, that if they believed the facts stated on the part of the plaintiffs, and that the articles mentioned in the bill of lading were the property of *Wright*, who shipped the same on the 18th of August 1810, on board the brig *Hunter*, then bound on a voyage to the Island of *Martinique*, in the *West Indies*, and consigned them to *Silas Marean* of that Island, for sales and returns, that immediately afterwards the brig, with the said articles on board, sailed and proceeded on the said voyage; that on the 24th of the said month, and long before the arrival of the brig at *Martinique*, *Wright*, for a valuable consideration, sold, transferred, and assigned the said articles in the bill of lading mentioned, to the plaintiffs, by an assignment under his hand of the said bill of lading, and also by the deed aforesaid; that the brig and

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cargo arrived at *St. Pierres*, in *Martinique*, some time in the beginning of the month of October in the same year, when and where the cargo was delivered by the master of the brig to a certain *C. B. Tuttle*, the co partner in trade of *Silas Mureau*, and were by him sold, and the proceeds thereof, amounting to $6700. and upwards, were by him received; that the defendants, together with *Andrew Ellicott*, &c. having demands against *Wright*, sent out to *Martinique* a certain *Benjamin Noland* as their agent, with instruction to seize the cargo for the purpose of satisfying the demands which they had against *Wright*; that *Noland* did, as their agent, without the authority of *Wright*, or of the plaintiffs, or either of them, receive from *Tuttle*, some time in the month of October 1810, the sum of $6700, and upwards, being part of the proceeds of said cargo, as payment of the said demands; that *Noland* on his return from *Martinique*, some time in the month of November or December in the said year, paid to the defendants the sum of $735. part of the sum of $6700, and upwards, which was claimed by the defendants as being due to them by *Wright*, by virtue of his promissory note to them of the 15th of August 1810, and payable 85 days after date; that then the plaintiffs are entitled to recover from the defendants the sum so by them received. The defendants then further gave in evidence, that *Wright*, at the time of making said deed to the plaintiffs, was wholly insolvent, and unable to pay his debts; and that he did afterwards apply to the general assembly of this state, and obtained a special act of insolvency, which said act, 1810, *ch.* 169, they gave in evidence; and that *Wright* did, in pursuance of and by virtue of this act of assembly, apply by petition to *Baltimore* county court, who released him as an insolvent debtor; which petition, with all the papers and proceedings thereon, they gave in evidence. The plaintiffs then gave in evidence, that at the time when *Wright* purchased the said flour from the defendants, and gave his note therefor, he was in good credit, and believed himself to be in safe and solvent circumstances, and purchased the flour for the purposes of his general trade. The defendants then proved, that the note given to them by *Wright*, was for part of the flour shipped as aforesaid to *Martinique*; and that *Wright*, at the same time, purchased more flour than the brig would carry; that the surplus was returned to the defendants, and the note was given for the nett amount actually received from them by *Wright*. The court gave the direction as prayed by the plaintiffs. The defendants excepted.

3. The defendants then offered to read in evidence, a paper purporting to be the record of certain proceedings of a court of justice, called the court of *First Instance* at *Saint Pierres* in the Island of *Martinique*, of which the following is a true translation, viz. "We, *John Amans Astorg*, President of the tribunal of the First Instance,

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sitting at *St. Pierres*, Island of *Martinique*, certify, that the signatures attached unto the documents hereto annexed, which are—

1st. Copy delivered by *Borde*, chief clerk of the tribunal of our ordinance, of the 6th October 1810, giving permission to Messrs. *B. & J. Ellicott*, *Andrew Ellicott*, *Thomas Ellicott*, and *Owings* and *Cheston*, represented by *Benjamin Noland*, to seize, stop, and put a guard on board the brig *Hunter*.

2d. Original attachment for the seizure and arrest made in the hands of Messrs. *Silas Marean* and *Tuttle*, by the sheriff *Dejean*, 6th October 1810.

3d. Certified copy by *Fronzat*, attorney in the county in this Island, of an act of agreement and security relative to the seizure of the flour, signed *C. B. Tuttle*, *Thomas T. Gantt.* & *Vachier*, the 6th October 1810.

4. Original petition presented to us in the name of the said Messrs. *Ellicotts*, and associates, 9th October 1810, which was duly notified the same day by the constable *Touin*, to Mr. *Samuel Wright*, legally represented in this cause by the consignee of the cargo.

5th. Copy of the interlocutory judgment of the 9th of October 1810, notified by the constable *Bruin*.

6th. Copy of another preliminary judgment of the 10th October 1810, notified by the constable *Rives*

7th. Copy of the process verbal of the viewers, proving the identity of the flour seized with that sold by the plaintiffs to Mr. *Samuel Wright*, notified by the constable *Bruin*.

8th. Copy of the definitive judgment of the 11th October 1810, at the end of which is the security of Mr. *Eml. Gervais*, both notified by the constable *Fayola*.

9th. The copy of an act of opposition signed by *Villette*, attorney of, and notified by the constable *Rives*, for Messrs. *Nicholson* and *Williams*, represented by Mr. *Benjamin Nicholson* their agent.

10th. The legal document, *(la piece legale,)* duly notified by the constable *Bruin* the 16th October 1810, containing *first*—A translated copy, (by the sworn interpreter,) from the *English* language, of a letter addressed the 30th August 1810, by Messrs. *Joseph H. Nicholson* and *Williams*, and postcripted by *Samuel Wright*, to Mr. *Silas Marean*, which contains the confirmation of the powers as well of Mr. *Marean* as agent of Mr. *Wright*, as of Mr. *Benjamin Nicholson* as agent of Mr. *J H. Nicholson* and *N. F. Williams*. *Secondly*—A translated copy by the said interpreter of the deed of conveyance made by the said *Samuel Wright* to the said *Nicholson* and *Williams* the 24th August 1810. *Thirdly* and lastly—Copy of the petition of the said *Nicholson* and *Williams*, by third opposition, *(Tierce opposition)* against our judgment of the 11th October 1810, presented by *De Bernard*, attorney—The whole notified in the name of the said *Nicholson Williams*.

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11th. Copy of the definitive judgment of the 16th October 1810, notified the next day, the 17th, by the constable *Berharbe*—Are truly the signatures of *Borde*, chief clerk of the court, of *Pronzat*, *De Bernard* and *Villette*, attorneys in the courts of this Island, of *Touin*, *Dejean*, *Bruin*, *Rives*, *Fayola* and *Berharbe*, constables in the court of *St. Pierres*, all in their said functions, and that full and entire faith and credit ought to be and are given thereto, as well in courts of justice as thereout. Given forth at our Hotel at *St. Pierres*, *Martinique*, 25th November 1811.

Astorg.

Sealed the same day.

(Seal) *Le Maistre*, ste. Isle."

Here follows the certificate of the governor, &c. of the Island of *Martinique*, (in *English*,) dated the 26th of November 1811, with the seal of the government of *Martinique* affixed, and signed,

"*Charles Wale.*"

"No. 1. Order to seize, stop, and put a guard on board the brig *Hunter*, Capt. *Yearly*, 5th October 1810.

Upon the petition presented to the tribunal of the first instance, sitting at *St Pierres*, *Martinique*, by Messrs. *Benj.* & *James Ellicott*, and associates, the following has been extracted: Seen and permitted to form in every place where it may be necessary, *opposition* to the departure of the *American* brig *Hunter*, captain *Yearly*, now in this road; and in case it becomes necessary, to establish one or more *Gend'armes* as a guard on board, at the risk, peril and fortune, of whomsoever it may belong; as also permitted to make seizure, arrest or opposition, and even levy execution for the preservation of all the rights of the just owners, and these presents shall be deposited among the minutes of the court. Commanded, &c. at *St. Pierres*, 5th October 1810.

Signed, *Astorg*,

Coll. *Borde.*

Sealed.

Borde.

"No. 2. Seizure made in the hands of Messrs. *Marean* and *Tuttle*, the 6th October 1810.

In the year 1810, the 6th of October, in virtue of the order of Mr. The President of the Tribunal of the First Instance of this city, under date of the 5th instant, signed and sealed in legal form, upon the request of Messrs. *B. & J. Ellicott*, *Andrew Ellicott*, *Thomas Ellicott*, and *Owings & Cheston*, represented by Mr. *Benjamin Noland*, domiciliated in the office of Mr. *Pronzat*, sworn attorney in this Island of *St. Pierres*, I, *Joseph Dejean*, admitted constable, *(matriculated,)* recorded in the tribunal of the first instance in this city, there residing, and here undersigning, notified and left this copy of attachment with Mr. *Silas Marean*, represented by Mr. *Tuttle* personally, in speaking to the latter in his house that he might not be ignorant of the declaration that I seize, arrest provisionally in his hands, all that he might have or owe, will have or will owe here-

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after, to Mr. *Samuel Wright*, forbidding him in the name of the king and justice, to let escape or deseize himself from, until it shall be otherwise decided by justice, under pain of answering in his proper and private name for the sum of $6794. principal, exclusive of costs and interest, requiring him to retain the foregoing in his possession, and moreover to make a positive declaration on the present attachment, and support it by oath should need require it; and I have to the said *Silas Marean*, represented by Mr. *Tuttle*, to him, speaking as before recited, declared that summons will be given him in time and place, of all which this is proof.

Signed, *Dejean.*

"No. 8. Agreement with *C. B. Tuttle*, and security of Mr. *Thomas T. Gantt* and *Vachier*, upon the seizure of the flour, 6th of October 1810.

This 6th of October 1810, I the undersigned *Caleb B. Tuttle*, *American* citizen, and partner and representative of *Silas Marean*, acting as well in my personal name, as agent of the said *Silas Marean*, considering that the brig *Hunter*, captain *Yearly*, the cargo of which is to us consigned by Mr. *Samuel Wright* of *Baltimore*, was, on its arrival yesterday in this road, seized and arrested at the suit of Messrs. *B.* & *J. Ellicott*, *A. Ellicott*, *Thomas Ellicott*, and *Owings* & *Cheston* of *Baltimore*, represented by Mr. *Benjamin Noland*, and that guards have been put on board in virtue of the orders of Mr. the president of the civil court of this city, under date of yesterday, in order to prevent the landing of the flour composing the cargo, and particularly of 653 barrels of flour sold by the reclaimants to the said *Samuel Wright;* and considering moreover the seizure and arrest made in our hands this day by the said claimants, to the prejudice of the said *Samuel Wright*, as also that the said cargo may be placed so as to prevent any unfortunate accident on board, and to profit of the favourable moment for the sale—declare, as well for myself as for the said *Silas Marean*, I render myself guarantee and responsible to the said *B.* & *J. Ellicott*, *A. Ellicott*, *T. Ellicott*, and *Owings* and *Cheston*, of *Baltimore*, represented here by the said *B. Noland*, for the entire value of all the rights of the claimants, and all the just and founded claims which they can have legally, and exercise against the said *Samuel Wright*, by reason of which they have made the above mentioned seizure, and that only unto the amount of the nett proceeds of the cargo of the said brig *Hunter*, to us consigned, after the sale thereof shall have been made; promising and obliging myself, as well for myself as for the said *Silas Marean*, to pay to the said claimants, or their agents or representative, the amount of the sum which shall be admitted to be to them due by the said *Samuel Wright*, unto the amount of the nett produce of the said cargo; provided the said sum shall prove sufficient to pay what shall be due, immediately as we shall be authorised to make the said payment

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by order of justice. And we, *Thomas T. Gantt* and *Antoine Vachier*, both established merchants at *St. Pierres*, after having taken cognizance of the above engagement entered into, as well by Mr. *Tuttle* as by Mr. *Silas Marean* represented by the said Mr *Tuttle*, declare that we render ourselves personally responsible and guarantees for the execution of the said engagement, jointly and severally, with the said *Silas Marean* and *C B. Tuttle*, for which we bind all our estates present and to come Done at St. *Pierres*, *Martinique*, the said 6th day of October 1810.

Signed, *C. B. Tuttle*, (Seal.)
Thos. T. Gantt, (Seal.)
Vachier, (Seal.)

Signed and sealed in presence of
(Signed) *Pronzat*
Desgault.

Certified to be conformable to the original remaining in my possession. *St. Pierres*, 10th October 1819.

Pronzat.

"No. 4. Petition of Messrs. *Ellicott*, &c. to the judge of *St. Pierres*, against *Samuel Wright*, legally represented by Messrs. *Marean* & *Tuttle*, consignees of the cargo of the brig *Hunter*, 9th October 1810.

To Mr. the honourable the president of the court of the first instance, sitting at *St. Pierres*, *Martinique*. The humble petition of Messrs. *Benja.* & *James Ellicott*, *Andrew Ellicott*, *Thomas Ellicott*, and *Owings* and *Cheston*, all merchants at *Baltimore*, represented in the colony by Mr. *Benja. Noland*, at present at *St. Pierres*, represent Sir, that Mr. *Samuel Wright*, their fellow-citizen, had formed the project of a fraudulent bankruptcy, in which he was willing that the petitioners should lose something. For which purpose he transported himself to them the 14th and 15th of the month of August last, and bought the quantity of 653 barrels flour for the sum of 6794 dollars. This flour was afterwards freighted on board the brig *Hunter*, captain *Yearly*, and expedited for *Martinique*. A few days afterwards Mr. *Samuel Wright* suspended his payments, and made a failure, after having made to certain persons, fictitious creditors, a fraudulent conveyance of almost all his property. These culpable underhand dealings, which the laws punish so severely, have given to the petitioners the assurance that Mr *Samuel Wright* intended to despoil them of the price of their flour, and that he would inevitably have executed his design, if they had not exerted themselves to counteract him. In consequence they have dispatched a light vessel, with Mr. *Noland* their agent, to pursue the vessel which carried away their flour, and have had the happiness that Mr. *Noland* should arrive at *St. Pierres* before the brig *Hunter*, and that on her arrival in port he has detained the vessel, and obtained permission to seize the flour, &c. &c. Mr. *Tuttle*, partner of Mr. *Marean*, consignee of the vessel, and agent or representative of Mr. *Samuel Wright* in this colony, in order to obtain

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the release of the flour, has given security, and obliged himself to pay the claim of the petitioners immediately, as by justice the payment shall be ordained. To obtain this end the petitioners request, that it will please your honour to permit them to summons to an audience extraordinary immediately, Mr. *Samuel Wright* of *Baltimore*, proprietor of the cargo of the brig *Hunter*, in the persons of Messrs. *C. B. Tuttle* and *Silas Marean*, consignees of the said cargo, to come and hear themselves condemned to pay the petitioners the sum of $6794, the price of the flour by them to him sold, and composing the cargo of the said brig *Hunter*, with interest, &c. &c. which shall be executed provisionally, &c.——In consequence decree, that the petitioners receive the said sum of Messrs *Tuttle* and *Marean* out of the proceeds of the sale of the said cargo, which being done, their obligation shall be discharged, which shall be executed, &c. under all reservation. This is justice.

Pronzat.

Seen, &c. permitted, summoned as requested, ordained, &c. at *St. Pierres*, *Martinique*, 9th October 1810.

Astorg.

In the year 1810, on the 9th October, at the request of *B. & J. Ellicott*, &c. merchants at *Baltimore*, represented in this colony by Mr. *B. Noland*, at present in this city of *St. Pierres*, for which he is domiciliated at the office of Mr. *Pronzat* their attorney, situated in this city of *St. Pierres*, I *John Baptiste Touin*, constable, admitted and registered in the court of the first instance of this city, there residing, undersigned, notified, and gave a copy of a translation of the different pieces of requests and orders before mentioned, and of the present summons, to Mr. *Samuel Wright* of *Baltimore*, proprietor of the cargo of the brig *Hunter*, in the person of Mr. *C. B. Tuttle* & *Silas Marean*, consignees of the said cargo, in speaking to a clerk domiciliated, that they might not be ignorant of a citation to appear this day, the 9th instant, at 11 o'clock in the morning, at the court-house of this city, before Mr. the president of the said court, to see judged to the claimants the object of their demand contained in their petition. All of which I have performed.

Touin.

"No. 5. Interlocutory judgment between Messrs. *Ellicott's*, &c. and Mr. *Samuel Wright*, legally represented by Messrs. *Marean & Tuttle*, 9th October 1810.

Extract from the register of the clerk's office of The Tribunal of the First Instance, sitting in the city of *St. Pierres*, Island of *Martinique*, on Tuesday the 9th of October 1810, in the morning, at an extraordinary hearing before us, *John Amans Astorg*, president of the tribunal of the first instance, sitting in the city of *St. Pierres*, Island of *Martinique* between Messrs. *B. & J. Ellicott*, &c. and *Owings & Cheston*, merchants of *Baltimore*, represented in this city by Mr. *Beniamin Noland*, plaintiffs, by petition notified by *Touin*, this day appearing by Mr. *Pronzat*, at-

torney of one part, and Mr. *Samuel Wright*, represented in this Island by Mr. *Silas Marean* and *C. B. Tuttle*, defendant, appearing by Mr. *Villette*, attorney on the other part. Parties heard, and the attorney of the king in his conclusions on the petition of Mr. *Villette*, and by consent of Mr. *Pronzat*, we order that the documents be exhibited upon which their demands are founded, which shall be communicated in the original, upon a receipt being given in due form. Costs suspended, which shall be executed notwithstanding appeal, on giving security, which shall be received before us in the accustomed manner. Done and given forth by us, the president of the aforesaid tribunal, at *St. Pierres*, *Martinique*, the day and year aforesaid, and thus signed on the register.

Astorg,
Borde."

Here follows a certificate of the preceding having been notified, and a copy delivered, to Mr. *Samuel Wright*, represented by Messrs. *Marean & Tuttle*, to appear on the 10th October, at 10 o'clock in the morning, at the court-house, &c. and signed (by a constable, &c.) *Bruin*.

"No. 6. Other preparative judgment between Messrs. *Ellicotts* &c. and Mr. *Wright*, 10th October 1810.

Extract from the register of the clerk's office of The Tribunal of the First Instance, sitting in the city of *St. Pierres*, Island of *Martinique*, on Wednesday the 10th of October 1810, in the morning, at an extraordinary audience before us, *John Amans Astorg*, president of the tribunal of the first instance, sitting in the city of *St. Pierres*, Island of *Martinique*, between Messrs. *B. & J Ellicott*, *A. Ellicott*, *T. Ellicott*, and *Owings & Cheston*, merchants of *Baltimore*, represented in this city by Mr. *Benjamin Noland*, plaintiffs, by petition notified by *Touin* the 9th of this month, and in execution of the appointment of the said day, appearing by Mr. *Pronzat*, attorney of one part, and Mr. *Samuel Wright*, represented in this Island by Mr. *S. Marean* and *C. B. Tuttle*, defendant, appearing by Mr. *Villette*, attorney, of the other part. Parties heard, and the attorney for the king in his conclusions, we order, before final judgment, that by viewers agreed on or named by the judge in the common form, verification shall be made of the identity of the flour claimed, with that which was sold by the plaintiffs, and that by a comparison of the brands which shall be presented by Mr. *Pronzat*, with that on the barrels, which shall be made report of by a process verbal, the parties present, or duly notified, in order, upon the same being deposited and reported, judgment of what is right may be rendered. The court ratifies the appointment respectively made by the parties of inspectors of Mr. *William Parsons & Hooper*, who are dispensed from an oath, and authorised to name a third, who is also dispensed from oath. Costs reserved, which shall be executed notwithstanding appeal, on giving security, which shall be received before us in the accustomed manner.

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Done and given forth by us, the president of the aforesaid tribunal, at *St. Pierres, Martinique*, the year and day aforesaid, and thus signed on the register.

Astorg,
Borde.

We appoint Thursday the 11th of this month, at 8 o'clock in the morning, to proceed in the operation ordered.

Wm. Parsons.

St. Pierres, 10th October 1810."

Here follows a certificate signed by *J. Rives*, constable, &c. notifying that he had delivered a copy of the preceding appointment and notification of the day, &c. to Mr. *S. Wright*, in the person of Mr. *Silas Marean* & *C. B. Tuttle*; also a copy to Mr. *Villette*, their attorney, to appear, &c.

"No. 7. Process verbal of the inspectors, proving the identity of the flour the 11th October 1810.

Extracts from the minutes of the clerk's office of the tribunal of the first instance, sitting at *St. Pierres*, Island of *Martinique*.

We the undersigned, named to verify the flour arrived from *Baltimore* by the brig *Hunter*, captain *Yearly*, declare, that we transported ourselves this day at 8 o'clock in the morning, to the warehouse of Mr. *Garout*, where the said flour is deposited. We there discovered 653 barrels, marked for the most part *J. Ellicott*, *E. Ellicott*, *B. Ellicott*, and some other of the mark *U. L. M.* and by the representation to us made by Mr. *Pronzat*, attorney of the Messrs. *Ellicotts*, of a note of the marks of 653 barrels, we have ascertained the identity of it with those on the barrels. *St. Pierres*, 11th October 1810.

Signed *W. Hooper,*
W. Parsons."

Ordered that the foregoing be deposited in the minutes of the clerk's office of the tribunal of the first instance, thence to be delivered to who may have occasion to require it. *St. Pierres*, *Martinique*, 11th October 1810.

Signed *Astorg,*
Coll. *Borde.*"

Here follows a certificate of the preceding having been notified to Mr. *Wright*, &c. to appear, &c. as herein before stated.

"No. 8. Definitive judgment.

To all present, and to whom these presents shall come, Greeting. The tribunal of the first instance, sitting in the city of *St. Pierres*, in the Island of *Martinique*, has rendered the following judgment, between the Messrs. *Benjamin* & *James Ellicott*, *Andrew Ellicott*, *Thomas Ellicott*, and *Owings* & *Cheston*, merchants of *Baltimore*, represented in this Island by Mr. *Benjamin Noland*, by power of attorney, plaintiffs, by a petition answered the 9th of this month, and in execution of the appointment of the tenth, appearing by *Pronzat*, attorney on the one part, and Mr. *Samuel Wright*, represented by Mr. *Silas Ma-*

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rean & *C. B. Tuttle*, defendant, summoned this day, appearing by Mr. *Villette*, attorney, on the other part. Parties being heard, and also the King's attorney, the court, considering the result of the process verbal of the verification reported of the identity of the flour with that inspected by the arbiters, has condemned and does condemn the defendant to pay to the plaintiffs, in round dollars, the sum of $6794, being the price for which they have sold him the flour, and comprising the cargo of the brig *Hunter*, which sum shall be accounted to them by the Messrs. *Tuttle* & *Marean*, out of the proceeds of the sale made by them of the cargo; provided nevertheless, that the plaintiffs shall give them bonds and sufficient security, to be accepted by them, for the return at *Baltimore* of the bills which they hold of Mr. *Wright* for the amount of the said flour, which bills shall be, in consequence of the payment made in execution of these presents, null and of no value against the defendant. Which being done shall release them from all demands therefor from all persons whatsoever. Besides, the defendant is condemned to pay interest on the said sum, counting from the day of the demand, and all costs, which shall be executed notwithstanding any appeal under the same security. Commanded and ordered to all constables, who are required to put in execution this judgment; and for that purpose are authorised to resort to summonses, intimations, and other acts, which may be necessary when thereto legally required. In testimony whereof the present judgment has been signed by the president of the tribunal, and by the clerk. *St. Pierres*, *Martinique*, Thursday the 11th of October 1810, in the morning, at an extraordinary audience.

(Signed on the Record,) *Borde*, Clerk, and
Astorg, President.

Coll. *Borde*.

Sealed at *St. Pierres*, *Martinique*, the said day.

Le Maistre, Scte. Isle.

I declare in execution of the foregoing judgment, that I render myself security for the return of the bills in *America*. *St. Pierres*, 11th October, 1810.

Em. Gervais."

Here follows a certificate of the foregoing being notified to Mr. *Wright*, &c.

"No. 9. Act of opposition by *Joseph H. Nicholson* & *Nathaniel F. Williams*, represented by *Benjamin Nicholson*, 12th October 1810.

At the request of *Joseph H. Nicholson* & *Nathaniel F. Williams*, merchants of *Baltimore*, represented by Mr. *Benjamin Nicholson*, at present in this city, be it signified and declared to Mr. *Tuttle*, merchant of *St. Pierres*, as well in his own name, as consignee of the cargo of the brig *Hunter* anchored in this road, that the claimants formally oppose the said *Tuttle's* paying or letting escape out of his hands, into any other persons whatsoever, the funds which he now has, or shall have, belonging to Mr. *Samuel*

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Wright, notwithstanding any judgment which may have been obtained by Messrs. *Ellicotts* & *Owings*, merchants of *Baltimore*, calling themselves creditors of Mr. *Samuel Wright*, under pain of paying twice, and also all costs, losses, damages and interest. With declaration that the plaintiffs will prosecute at law, immediately, Messrs. *Ellicotts*, and all others that may be necessary, under all reserves and protestations which he is entitled to; all which I have performed.

De Bernard.

The foregoing opposition was notified by a summons of *Bruin* the 12th of this month, conformably to copy.

Villette."

Here follows a certificate of notification to Messrs. *Ellicotts*, &c.

"No. 10. Containing, 1st. Letter of *Nicholson* & *Williams*, and *S. Wright*, to *S. Marean*. 2d. Deed from *Wright* to *Nicholson* & *Williams*. 3d. Petition of *Nicholson* & *Williams* to the judge of *St. Pierres*, dated 16th of October 1810.

1st. To *Silas Marean*, Esquire. *St Pierres, Martinique*, *Baltimore*, August 30, 1810.

Sir—Mr. *Benjamin Nicholson*, the bearer, goes out with full powers to take possession of the brig *Hunter*, and her cargo, lately consigned to you by Mr *Samuel Wright*. He carries with him the deed of indenture, duly authenticated, which conveys the property to *Nathaniel F. Williams* and myself. For your agency in the business, Mr. *Nicholson* is instructed to allow you your regular commission. I understand that an agent is going out for the purpose of attaching this property for the use of Messrs. *Ellicotts*, and others; but Mr. *S. Wright's* notes to them will not be due until November, and they can lay no attachment until that time, even if the property still continued to be *Wright's*. From the intimacy between your brother, *T. Marean* and *N. F. Williams*, we are induced to hope that you will use all exertions for our interest. If the property is sold when Mr. *Nicholson* arrives, you will account with him for the proceeds.

I am, Sir,
Yr. Obt. Servt.
Joseph H. Nicholson,
For self & *N. F. Williams.*

Sir—You will please to conform to the above instructions, and oblige your ob't. serv't.

Saml. Wright."

2d. Here follows the deed from *Samuel Wright* to *Joseph H. Nicholson* and *Nathaniel F. Williams*, dated the 24th of August 1810, stating that the said *Nicholson* & *Williams* had endorsed sundry promissory notes for the said *Wright*, to the amount of $22,450, endorsed by the said *Nicholson*, and $8000 endorsed by the said *Williams*, and to secure, save harmless, and keep indemnified, the said

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Nicholson & Williams, as endorsers, the said *Wright* conveyed to the said *Nicholson & Williams*, a tract of land called *Shatton*, lying in *Queen-Anne's* county; also all that brig or vessel called *The Hunter*, together with her tackle, &c. and all and singular the cargo, &c. and all profits and proceeds thereof, also ten shares of stock in the *Union Bank of Maryland*, also twenty shares in the *Union Manufacturing Company*, &c. &c. in trust, that the said *Nicholson & Williams* shall take possession of the said property, and when proper sell, &c. and the proceeds to apply to the discharge of all and every of the said promissory notes, and the balance, if any, pay over to the said *Wright*, &c. Acknowledged before two justices of *Baltimore* county on the 24th of August 1810, and recorded in the records of the said county on the 31st of August 1810.

No. 10 continued. 3d. "To Mr. The President, &c. The humble petition of *J. H. Nicholson* and *N. F. Williams*, merchants of *Baltimore*, represented by Mr. *Benj. Nicholson*, now in this Island, represent, Sir, that the brig *Hunter* sailed from *Baltimore*, and has arrived and moored in this road, with a cargo, the sale of which has been confided to the care of *Silas Marean & C. B. Tuttle*. The arrival of the brig *Hunter* was followed by that of Mr. *B. Noland*, who says he is the representative of the commercial houses of Messrs. *B & J. Ellicott*, *Andrew Ellicott*, *Thomas Ellicott*, and *Owings & Cheston*, of *Baltimore*. Mr. *B. Noland* hastened to set up a demand against Mr. *Samuel Wright*, represented by Mr. *Silas Marean* and *C. B. Tuttle*, in order to have a privilege on the proceeds of the cargo of the aforesaid brig. The means which were resorted to by the Messrs. *Ellicotts*, &c. were founded on the fact of their having sold the flour composing the cargo to Mr. *Wright*. A sentence of the court, given the 11th of October inst. pronounces thus—"seeing what results from the process verbal of the verification reported concerning the identity of the flour sold by the plaintiffs, with that inspected by the arbiters, the court has condemned, and does condemn, the defendant, *Samuel Wright*, to pay to the plaintiffs, Messrs *Ellicotts*, &c. in round dollars, the sum of $6794, for the price of the flour which they have sold him, and composing the cargo of the brig *Hunter*; which sum shall be accounted to them by the Messrs. *Tuttle & Marean*, out of the proceeds of the sale by them made of the cargo, on the plaintiffs giving to them good and sufficient security that they will return at *Baltimore* the notes given by said *Samuel Wright*, for the price of the said flour," &c. Without entering on the discussion of the means which has induced the court to pronounce thus; without contesting the identity of the flour forming the cargo of the brig with that of the flour sold by Messrs. *Ellicotts*, &c. or pretended to have been sold by them, we find it inadmissible in the demand which they have set up. The Messrs *Ellicotts*, &c. had not decided to claim, if they had not believed the

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the flour was the property of Mr. *Wright*, and had never ceased to belong to him. The court, in rendering the sentence of the 11th of October, had thought the same; but this was all a chimera; in making to cease this illusion, we will make cease the right of Messrs. *Ellicotts*, &c. We will prove to them that they have no pretence on the cargo of the brig *Hunter*; that they have not, in a word, any privilege or claim. The cargo of the brig *Hunter* is not the property of Mr. *Samuel Wright*. Behold, by this reason, only all the rights of Messrs. *Ellicotts*, &c. are dissipated—vanished. A deed made at *Baltimore*, under date of the 24th August last, between *Samuel Wright* and the petitioners, has transferred to the petitioners the right, not only of the cargo, but of the brig also. This deed is clothed with all the forms necessary at the time of its being made; it has invested the petitioners with the objects sold Mr. *Wright* has ceased to be proprietor, and in admitting to Messrs. *Ellicotts*, &c any right whatsoever to the cargo, this right ceased on the sale and transfer made to the petitioners. They present themselves this day with this deed, sanctioned by the authorities of *Baltimore*. They come and demand the execution of this deed—They come and claim the property which has been transferred to them. They exercise the right which they certainly have, and which no one contest with them. The law which the Messrs. *Ellicotts*, &c. have no doubt invoked to sustain their demand, is against them; this law does not give them the privilege, but in the case where the object seized shall be still in the possession of the debtor—shall be still his property. But Mr. *Wright* is no longer proprietor—He has sold it. The objects are no longer in his possession—He has divested himself of it in order to put it in possession of the purchaser. The former sellers have not then any privilege—They have no claim on that which is no longer the property of their debtor. If the Messrs. *Ellicotts*, &c. have yielded their confidence to Mr. *Wright*, the petitioners cannot be responsible for the consequences—let them address themselves to him to make him pay them the sum he owes them, but let them cease to seek a pledge from the property of the petitioners. Already by a judgment you have authorised the petitioners to seize and stop the cargo in the hands of Mr. *Tuttle*. You have now only to annul the pretensions of the Messrs. *Ellicotts*, &c. and this act is easy. The circumstances which militated in favour of the petitioners have been established; they do not leave any doubt of the legitimacy of their claim. But a sentence of the court has pronounced in favour of the Messrs. *Ellicotts*, &c. a privilege on the property of the petitioners. The court, as we have already said, has participated in the same mistake with the Messrs. *Ellicotts*, &c. It thought that the cargo was still the property of Mr. *Wright*; it has pronounced under this belief. The contrary being demonstrated, it will hasten to correct its judgment, and will render justice to whom it belongs. The means of a third opposi-

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tion is open to the petitioners; they cannot too hastily seize it in order to put the court in a condition to pronounce on the subject of their claim. Having examined this, will it please you to authorise your petitioners to make opposition to the sentence which they make known and declare, to form the objection to the execution of the sentence which was obtained by misrepresentation of the 11th instant. In consequence, permit them to call before the court immediately—*First*, the Messrs. *Benjamin* and *James Ellicott*, &c. merchants of *Baltimore*, represented by Mr. *Benjamin Noland*, now in this city, stating himself as acting by their power of attorney, domiciled at Mr. *Pronzat*, their attorney. *Secondly*, Mr. *Samuel Wright*, represented by Mr. *Silas Marean* & *C. B. Tuttle*, merchants in this city, domiciliated at Mr. *Villette's*, his attorney, to come, see and receive, the petitioner's third opposing to the execution of the sentence—See that the said sentence be declared null and without effect, and as if not rendered—See the parties remitted to the same condition in which they were before the same was rendered, and pronounced by a new judgment; the Messrs. *Ellicotts*, &c. see themselves declared purely and simply not capable of supporting their demand, the aim of their expectations, at all events unfounded—See themselves nonsuited and condemned in all the expenses; saving and reserving to the petitioners all their rights against Messrs. *Marean* & *Tuttle*, to exercise them as they may find them convenient, to obtain the account and the produce of the cargo of the brig *Hunter*, as being the sole and only proprietors under all reservations, and saving also all other rights, actions and conclusions, which shall be executed, &c. This is justice.

Signed *De Bernard.*

Seen, &c. recognised the third opposition, and permitted to be summoned to the end requested, commanded, &c. *St. Pierres*, 16th October 1810.

Signed, *Astorg.*

Copy *De Bernard.*"

Here follows a certificate of notification by the constable to Messrs. *Ellicotts*, &c. of the letter, deed, &c. to appear the 16th October 1810, before the president, &c.

"No. 11. *Definitive judgment*, &c. 16th October 1810.

To all present, and to whom these presents shall come, greeting. The court of the first instance, sitting in the city of *St. Pierres*, Island of *Martinique*, has rendered the following judgment between Messrs. *J. H. Nicholson* & *N. F. Williams*, merchants at *Baltimore*, represented by Mr. *B. Nicholson*, now in this Island, plaintiffs, by a petition answered this day in third opposition to the execution of the sentence of the 11th of this month, appearing by Mr. *De Bernard* attorney of the one part, and Messrs. *B.* & *J. Ellicott* &c. merchants of *Baltimore*, represented in this Island by Mr. *B. Noland*, under power of attorney, defendants, appearing by Mr. *Pronzat* attorney of the other part. And also Mr. *Samuel*

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Wright, represented in this Island by Mr. *Silas Marean* & *C. B. Tuttle*, merchants, and his consignees, appearing by Mr. *Villette*, attorney, defendant, summoned to this day, of the other part. The parties being heard, and the king's attorney in his conclusions—The court has taken cognizance of the declaration of Mr. *Villette*, that conformably to the instructions which he has received from Mr. *Samuel Wright*, Mr. *Tuttle* adheres to the conclusions taken by the plaintiffs. Wherefore, the court considering the epoch of the sale of the flour by the Messrs. *Ellicotts*, &c. and that of the deed consented to by Mr. *Wright*, for the benefit of Mr. *Nicholson*, the one on the 15th, and the other on the 24th. Considering that the said deed announces that it is only a deposit for the payment of the notes which have been or may be given by the said *Nicholson* to *Wright*, that thus there has been no definitive transfer of the property. Considering besides, the quality of Mr. *Nicholson*, relatively to Mr. *Wright*, that of relationship. Considering, in consequence that the flour has never ceased to be for the benefit of Mr. *Wright*, and that the privilege of the reclamation is yielded to the seller, when he finds the merchandise sold in the possession of the purchaser, independently of whatever might result from the failure of Mr. *Wright*. The court has cast, and does cast, the plaintiffs from the reclamation—condemns them in a fine of 150 livres, to be applied according to law; and also in all costs of suit—which shall be executed, notwithstanding any appeal, in giving security, which shall be received before us in the customary way. Commanded and ordered to all constables who are required to put in execution this judgment, and for that purpose are authorised to resort to summonses, intimations, and other acts, which may be necessary when thereto legally required. In testimony whereof, the present judgment has been signed by the president, and by the clerk. *St. Pierres*, *Martinique*, Tuesday the 16th of October 1810, in the morning, at an extraordinary audience. Signed on the register, *Borde*, clerk, and *Astorg*, president.

Coll. *Borde.*

Sealed at *St. Pierres*, *Martinique*, the said day.

(L.S) *Le Maistre*, Ste. Isle."

Here follows a certificate of notification to Messrs. *Nicholson* & *Williams*, *S. Wright*, and their attornies, and agents, &c.

The defendants also proved, by a witness skilled in the *French* laws, and in the proceedings of the *French* tribunals, that the said paper is authenticated in the manner used and authorised in the territories and tribunals of *France*. That the signature "*Astorg*," subscribed to the attestation on the first page of the said paper, is the signature and hand-writing of *Jean Amans Astorg*, who, at the time when the said attestation bears date, was chief judge or president of the said court, in the attestation and paper mentioned, and that the seal affixed to the attestation in

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the first page, is precisely similar to the seal used at the time in *Gaudaloupe*, as the colonial seal of the latter Island; for which reason the witness believed it to be the colonial seal at the time used in *Martinique* for the authentication of judicial proceedings, and other public acts and papers; but that he had no knowledge of the colonial seal of *Martinique* at that time; and that at that time the courts of *Martinique* had no particular or appropriate seals for their own proceedings, but used the colonial seal for all purposes when a seal was necessary. The plaintiffs proved by the said witness, that according to the laws of *France*, and the constitution and practice of *French* courts, and of the court of the first instance at *Saint Pierres*, in *Martinique*, no part of the proceedings in any case is lodged with the register of the court, or recorded, except the judgment of the court itself, and such acts as were done by its express order, such as the process verbal, which it ordered to be made and returned, and certificates of commissioners appointed by it, to ascertain and report any fact; but that the petitions or claims of the parties, the orders for citation founded on them, the citations made in pursuance of such orders, the answers of the opposite party, the documents produced by either party in support of the claim or defence, were considered as the private papers of the parties respectively, and were not lodged in court, or recorded, but remained in the possession of the advocates of the parties respectively, by whom the originals were produced and certified under their hands, whenever it became necessary to use those papers; and that in such cases the truth or solemnity of those signatures was attested by the president of the court, under the colonial seal. The plaintiffs then objected to the reading of the said papers, or any part thereof, as evidence. But the court over-ruled the objection, and permitted the paper, and every part thereof, to be read in evidence by the defendants. The plaintiffs excepted.

4. The plaintiffs then produced *Benjamin Nicholson*, the person mentioned in the said paper and proceedings in *Martinique*, and offered to swear him as a witness, to prove, that when he went to *Martinique* to obtain possession of the cargo of the brig *Hunter*, he had no authority of any kind, or instructions, from the plaintiffs, or either of them, to institute any legal proceeding whatever on their behalf in the Island of *Martinique*, or to appear for them in any such proceeding, or in any court, further than such authority may have been given him in and by a certain letter addressed by *Joseph H. Nicholson*, one of the plaintiffs, to *Silas Marean*, of which letter, a paper purporting to be a true copy, is contained in the paper proceedings aforesaid; and also, that as soon as the proposed witness returned to *Baltimore* from *Martinique*, and communicated to the plaintiff, *Joseph H. Nicholson*, the steps which he the proposed witness had taken about the said cargo in the said court of first instance at *Saint Pierres*, the said plain-

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tiff disapproved those steps and disavowed them. But the defendants objected to this evidence; and the court sustained their objection, and refused to permit the evidence to be given to the jury. The plaintiffs excepted.

5. The plaintiffs then prayed the opinion of the court, and their direction to the jury, that the judgment and proceedings in *Martinique* do not affect the right of the plaintiffs to recover in this action. And this opinion the court gave. The defendants excepted. Verdict and judgment for the plaintiffs, for $803 40. The plaintiffs and defendants both appealed to this court, but the former afterwards dismissed their appeal.

The cause, on the appeal by the defendants, was argued at the last term on the *first*, *second*, and *fifth* bills of exceptions, before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Martin, *T. Buchanan* and *Winder*, for the Appellants. 1. On the *first* bill of exceptions. The court below refused to permit the defendants to give in evidence that the money was received in pursuance of a decree of the court of *Martinique*. The evidence was offered to show, that the money was so received that *assumpsit* would not lie for it. It was not intended to prove the record or the judgment by the admission of the evidence; but it came in incidentally, and it was not necessary to produce the judgment under which the money was received. If the witness was competent to prove he received the money, he was competent to prove from whom and on what account he received it. It was, and may be important for the defendants to prove, that the money was paid under judicial process; and if they could have been permitted to give such proof, then the plaintiffs would have been bound to produce the judgment, and to prove it to have been erroneous.

2. On the *second* bill of exceptions. The court below referred a question of law to the jury. On the 24th of August 1810, *Wright* being insolvent, and unable to pay his debts, made an assignment of his property to the plaintiffs. They referred to the act of 1805, *ch.* 110, *s* 9, which declares, that any conveyance made to any one by an insolvent debtor, is an undue and improper preference; and the act of 1807, *ch.* 55, which declares what shall be an undue and improper preference. *Mann vs. Gittings & Smith*, 1 *Harr. & Johns.* 492. If *Wright* was insolvent on the 24th of August 1810, the deed was not effectual, and the plaintiffs cannot support this action. It was giving an undue and improper preference to some of his creditors. It was unequitable and unjust, and a fraud as to other creditors. If the plaintiffs are not entitled to recover equitably and fairly against the defendants, they cannot support this action. The agent of *Wright* paid the money voluntarily to the agent of the defendants, on a

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full disclosure of all circumstances, and the plaintiffs have no right to call on them to refund. An agent is answerable to his principal, so that if the payment was not properly made, the agent is answerable to *Wright*, or his assignees. It is not stated that the property was seized by the defendants, nor that *Tuttle* did not pay the money voluntarily. If the property was seized, it was done legally. But the payment was made when there was no legal authority compelling *Tuttle* to pay the money. No matter whether the money was received by the defendants as a voluntary payment made by the agent, or under a judgment of a proper tribunal, the plaintiffs cannot recover it back in this form of action. It cannot be said that the defendants received the money for the use of the plaintiffs. It was received in opposition to a claim set up by them against the defendants. How then can it be said to be received for their use? Will it be said that the assignees under their assignment, which was made in violation of the policy of the insolvent law, can recover against persons who had an equitable claim? The deed to the plaintiffs is in express contravention of the laws of this state, and shall the assignees under it recover of the defendants money received legally by them for a valuable claim? The deed is also void under the act of 1729, *ch.* 8, s. 5, prohibiting secret sales. This law is confined to property in the state, and could not affect any property not within its limits and jurisdiction. The *lex loci* must prevail as to personal property. *De Sobry vs. Terrier*, 2 *Harr.* & *Johns.* 224. Deeds and wills of personal property must be according to the laws of the place where the property is situated. Such a deed might be enforced in another country, where there was no equitable claim to the property in another person. *Hunter vs Potts*, 4 *T. R.* 182. *Sill vs. Worswick*, 1 *H. Blk.* 665. The reason why the assignment in the cases cited extended to another country, is given in the cases under an act of parliament extending it. Can it be said that the defendants are parties to the deed? It may be said that they have, as citizens of the state, given their assent to the insolvent law. Such a deed as this would, in *England*, be void as being against the bankrupt law. It should be so here, being expressly contrary to our insolvent law—being a fraudulent act as it relates to the creditors. It would be using the court as an instrument to sanction that which the law expressly declares to be improper. Goods purchased and not paid for, may be seized where the purchaser is insolvent, notwithstanding he ad assigned them, to defraud the creditor, for a valuable consideration. They may be stopped *in transitu* to pay the seller, notwithstanding his debt is not due. It arises on the high principle of equity, that a man who has sold property, and the purchaser becomes insolvent, shall take his property back, where he has not been paid, and notwithstanding his debt is not due. The claim is fair and honest. The rigid rule of law is to bend to the

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equity of such claim. The assignment to the plaintiffs covered all the debtor's property, notwithstanding it professes to say the surplus was to go to the general creditors. The schedule shows, that the whole property would not be more than sufficient to pay the debt to the plaintiffs. They cannot recover unless they have a superior equity.

3. On the *fifth* bill of exceptions. 1. The record of the judgment in *Martinique* was admitted in evidence by the court below, as stated in the *third* bill of exceptions, (taken by the plaintiffs and not now before this court,) but the court below said it did not affect the plaintiffs' right to recover. They cannot say the evidence was inadmissible, because, on their bills of exceptions, this court is not to decide. The questions arising on that record are—1. Whether or not the decree therein mentioned is conclusive? If it is not conclusive, 2. How far it operates? And if it operates at all, 3. How far the plaintiffs have shown matter to avoid the *prima facie* operation of it? The judgment given by the court in *Martinique* is correct, and was properly given on the facts in the case. Those facts are correctly stated in the material parts, in the petition of *Noland*, the agent of the defendants. If *Wright* was guilty of fraud, the plaintiffs are affected by it, and answerable for it so far as the defendants are interested. The court at *Martinique* condemned the property for the benefit of the present defendants, on the proceedings as they then stood before the arrival of the agent of the plaintiffs. When he arrived, he instituted a proceeding familiar in those courts, called a third opposition to the sentence before pronounced by the court. The agent was properly authorised to act for the plaintiffs; if he was not, for what purpose was he sent? He was sent to repel all proceedings which the defendants might institute for having their claim paid out of the cargo. The judge at *Martinique* recognised the agent, and the court were called upon to review their former decision, which they did, and decided definitively on the question in favour of these defendants, having before them all persons concerned, who were the present plaintiffs and defendants. If *Wright* was guilty of a fraud in the purchase of the flour from the defendants, the court in *Martinique* gave the same judgment which the court here would have given. That court had jurisdiction of the case. The property was there, and their laws had a control over it; and the court had a right to draw the conclusion from the facts, that *Wright* had been guilty of a fraud—that court having a right to judge on the law and the fact. The plaintiffs are not considered as aiding, or having any knowledge of the fraud; but if *Wright* was guilty of a fraud, it will affect their right to recover. *Allison vs. Matthieu*, 3 *Johns. Rep.* 235. It was not an ordinary commercial transaction, but was manifestly a case of fraud; if it was not, how could the court in *Martinique* decide as it did? The plaintiffs were mere trustees, to indemnify themselves for notes endorsed—it

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was a resulting trust for any residue. Under the deed of assignment to them, they stood in the place of *Wright*. They did not take as purchasers, but they took the property subject to all claims. The property was never divested out of the defendants, there being a fraud practised on them by *Wright*. It was not a fair commercial transaction; but it is evident that fraud was intended—the purchase having been made with a view to bankruptcy. If the facts had been submitted to a jury of this country, the property would have been recovered by the defendants, from *Wright's* trustees. The court in *Martinique* was invested with cognizance of the case, and perfectly competent to decide. Suppose the property had not been shipped, and an action of trover had been brought by the defendants, would not the jury be bound to draw the legal conclusion, that there was fraud; and if there was fraud in *Wright*, it is equally so in his trustees or assignees. This court would have drawn the same conclusion from the facts, which the court in *Martinique* did; and the same decision has taken place there, which would have taken place here, had the question been brought before a legal tribunal in this state. *Winchester, et al. vs. Brooke*, 2 *Harr. & Johns.* 1. The consignees of *Wright* were equally the consignees of the plaintiffs. The proceedings in *Martinique* is a proceeding *in rem*. Every person who could be, were made parties. *Wright* and his assignees were as much parties as they could be in the case of that kind, or as they would be here on a foreign attachment. If that court had acted upon the laws of this state, it could not have given a different decision—acting upon the civil law, or the law of nations, they could not have decided otherwise. 2. Whether that court had a right to draw the legal conclusion that there was fraud, is not for this court to decide, unless they undertake to constitute themselves a court of review, which it is contended they cannot do, but that they are concluded by the judgment which was given by the court in *Martinique*.

On this question they cited *Hughes vs. Cornelius*, Sir *T. Raym.* 473. S. C. 2 *Show.* 232. *Beak vs. Tyrrell. Carthew*, 32. *Green vs. Wallen*, 2 *Ld. Raym.* 893. *Ewer vs. Jones*, *Ib.* 935. 12 *Vin. Ab.* 87. 1 *Marsh. on Insur.* 388, 390, 392, 393, 394, 398, 399, 401, 403, 404. *The Christopher*, 2 *Rob. Adm. Rep.* 210, *(note.)* *Oddy vs. Bovill*, 2 *East*, 473. *Smith vs. Surridge*, 4 *Esp. Rep.* 25. *Bernardi vs. Motteux*, *Dougl.* 581. *Stodder vs Dunlop*, 2 *Harr. Ent.* 490. *Rose vs. Himely*, 4 *Cranch*, 276. *Hudson vs. Guestier*, *Ibid* 294. *Croudson vs. Leonard*, *Ibid* 434, 438. *Fitzsimmons vs. The Newport Insurance Company. Ibid* 186, 197. There can be no question but that admiralty sentences, from the year 1682 to the present time, have been held conclusive. Lord *Kenyon* says, in *Walker vs. Witter*, *Dougl.* 1, *(note.)* that he knows no reason why the judgments of all foreign courts are not evidence, as well as of admiralty courts. They contended, that the

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case of *Burrows vs. Jemino*, 2 *Stra.* 733, went the whole length of that before the court. In *Cooke's Bank Laws*, 522, cited in *Sill vs. Worswick*, 1 *H. Blk. Rep* 668, the case was abandoned upon the force of the authorities cited. In *Rapalje vs. Emory*, 2 *Dall. Rep.* 51, 231, the decisions referred to were recognized. But it will be said that later decisions are against the principle contended for on the part of the appellants; that in *Hunter vs. Potts*, 4 *T. R.* 182, 192, the money was directed to be refunded, notwithstanding the decision of a foreign court This decision went upon the bankrupt laws, where both parties were *English* subjects, and were bound to know those laws—their assent to them was inferred. *Sill vs. Worswick*, 1 *H. Blk.* 665, was decided on the same principle, of the parties being bound by the bankrupt laws of their own country, and refers to *Le Chevalier vs. Lynch*, 1 *Dougl.* 170. In *Walker vs. Witter*, 1 *Dougl.* 1, there is a class of cases in the notes, making the decision of a foreign court *prima facie* evidence of its correctness, so as to found a claim thereon to enforce it in a court in *Great Britain.* In *Maley vs. Shuttick*, 3 *Cranch*, 488, it was held, that the judgment of a foreign court was evidence of its own correctness. There was nothing to impugn the decision of the court in *Martinique*, which declared that the property was liable to the claim of the present defendants. It was a court of competent authority. Every thing was before the court, and the agent of the plaintiffs was contesting the case, so that it was between the present parties. There is no case which says that a decision between the same parties before a court of competent jurisdiction, is not conclusive. It might be questioned where it was not between the same parties. Were it not conclusive, when between the same parties, there would be no end to litigation. The decision of the court of *Martinique* strengthens the equitable claim of the defendants. What is the effect of a judgment rendered in a domestic tribunal as contrasted with a municipal tribunal? They are conclusive between the same parties in all other jurisdictions. *Bull. N. P.* 244. 1 *Peake's Evid.* 75. *Blackham's*, case, 1 *Salk.* 290. *Harper vs. Carr*, 7 *T. R.* 270. *Contee vs. Cooke*, 2 *Harr. & Johns.* 179. Where the judgment of a foreign court is to be carried into effect, it is different. For instance, where a suit is brought upon a foreign judgment, the court here must be satisfied that it is correct, but it is *prima facie* evidence of the debt. In the case before the court, the judgment was executed—it was at an end, the money having been paid under it; but the plaintiffs come here and claim to have the money paid under the judgment refunded, and paid to them. Before that is done they must show some authority for it, before this court will decide that the judgment is incorrect, and that the money paid under it shall be returned. Where a judgment is executed, there is an end of the subject upon which it was given. All the authorities go to establish the

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principle, that where a court is called on to carry into effect a judgment of a foreign state, it would not, until lately, do so; but owing to the peculiar situation of our union, a judgment in one state is conclusive evidence in every other state. There is a uniform system of decisions pervading the commercial world; and a judgment in one court of admiralty is respected in another. That court professes to act upon the law of nations; but in many cases they do not do so, and there have been many complaints upon the subject. Even Sir *William Scott* acts upon the local laws of his own government instead of acting upon the laws of nations The judgments of such courts are respected; and if so, there is a greater reason to respect the municipal decisions of the country. Although this is not a decision of a *British* court of King's Bench, yet it is a decision of a municipal tribunal. There is a distinction between the judgment of a municipal court which has been *executed*, and where it has not been executed; and there is a wide distinction where the judgment of a foreign court is brought in collaterally, and where it is brought directly before the court. In *Rapalje vs. Emory*, 2 *Dall. Rep.* 51, 231, the court decided, that the decision of the court of *St. Eustatia* was right; but that whether right or wrong, the judgment was conclusive. In *Philips vs. Hunter*, 2 *H. Blk. Rep.* 402, an attempt was made to obtain a preference out of bankrupt's property. The court said, that the judgment of the court in *Pennsylvania* must be taken to be binding between the parties to the suit in the foreign country. The opinion of *Eyre*, Ch. J. shows the true ground of the decision, which was, that the court could not examine into a judgment of a foreign country, when brought before the court collaterally; but that when the judgment was to be enforced, it is examinable. Where the money is paid under a judgment in a foreign country, it cannot be recovered back in the court of any other country. The authorities cited all show this to be the case, except cases arising under the bankrupt laws of *Great Britain*, and between its subjects. If the judgment in *Martinique* was not conclusive, it was *prima facie* evidence of the judgment recovered, and the court below have said it "does not affect the plaintiffs' right to recover." Why did it not affect their right to recover? Was it not *prima facie* evidence of the debt recovered? The court permitted it to go to the jury, and then directed them that it was not to affect the plaintiffs' case; that it had no force, validity or effect. Why permit it to go to the jury if it was to have no effect? Can this court sanction such a decision? If the judgment offered in evidence was correct, then there is an end of the case, and the judgment of the court below must be reversed.

Harper, for the Appellees. 1. On the *first* bill of exceptions. An attempt was made by the defendants below, to prove that the money was received by their agent, under

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a judgment of a foreign court, without producing the judgment. Here was an attempt then to prove a judgment by parol. Can such proof be admitted? The rule of law is, that you cannot give parol evidence of a written paper, more especially of a record. The evidence offered to be given by Mr. *Sterett* was mere hearsay, and was not sufficient to let in the evidence offered by the defendants, to prove that *Tuttle* paid the money to *Noland* under a judgment. Whether the money was received in pursuance of the judgment, is to say that the judgment existed. Could it be evidence of the judgment, when the judgment, if any, might be produced? The witness might be mistaken, and the judgment was the best evidence.

2. On the *second* bill of exceptions. The objection to the opinion given by the court below on the statement in this exception, is that the court referred a question of law to the jury. The prayer was, that if the jury believed the facts stated, then the plaintiffs were entitled to recover. The consequence in point of law was, that if the jury found the facts, then the plaintiffs were entitled to recover. The legal conclusion was to be drawn from the facts being found to be true. But it has been said that this is an equitable action, and that the plaintiffs cannot recover, their claim being an inequitable one. That *Wright* made the assignment to defeat his creditors, giving an undue and improper preference, which our insolvent laws will not suffer. That the assignment was fraudulent; and yet evidence was given, that when he purchased the flour he was in good credit, and that the purchase was made solely for the purposes of general trade. There was surplus flour returned to the defendants, and this shows that no fraud was intended. There was no fraud, or the want of equity existing, to prevent a recovery by the plaintiffs. If a legal right was shown for the money, then the action will lie. There was not an undue and improper preference. The act of 1807, *ch.* 55, speaks of an undue and improper preference, and that it should be void. Does the act refer to the bankrupt laws as a system? It must refer to the common law. It was not an improper preference in equity. Under our laws a debtor may prefer one creditor to another. Under the bankrupt law, while it existed, such an assignment would not have been decided to be an undue and improper preference, and therefore void. *M'Mechen vs. Grundy & Thornburgh's Lessee*, 3 *Harr. & Johns.* 185. The insolvent laws do not say the deed, giving an undue and improper preference, shall be void, but that the party making it should not be entitled to the benefit of the law. It is not true that an action cannot be supported for an equitable demand; and if were true, it is not true that the preference here given makes the deed void, and the demand inequitable. But here the question must depend upon the general law, and not upon the insolvent laws. There was a special insolvent law in favour of *Wright*, and his case was extracted from the ge-

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neral insolvent law. The general system of our insolvent law, if taken into view, will be found to be this, that if there has been *an undue and improper preference*, the petitioner shall not be discharged. What is an undue and improper preference under the act of 1805, *ch.* 110, that law does not determine. But it is said, that the act of 1807, *ch.* 53, does. This last act has nothing to do with the case. The special law, in favour of *Wright*, refers the question to the general or common law, not to the insolvent law system of the state. It comes under the general and legal principle, whether it is an undue and improper preference to secure a surety. There is no general system of insolvent law which stands in the way but the act of 1774, *ch.* 28, and that act does not. This is not a case falling under the insolvent laws. It is a special law of its own. There is no general system of insolvent laws, and nothing to which the court can look, but to the general law of the land. If there was a general insolvent system, this case would not come under it, there being here a special law in *Wright's* favour. But it has been said, that the plaintiffs were mere trustees for *Wright*, and that the case is to be considered as if between him and the defendants. They are trustees, but for whose benefit? Not for the benefit of *Wright*, but for themselves; and they are the owners in law and equity. They are as much the owners of the property as if no trusts had been stated in the deed from *Wright* to them. The liabilities had been incurred by them, and only a few days had to elapse before the notes would fall due. They paid the notes before the proceedings were commenced in *Martinique*, and when the decision took place, they were interested as purchasers for a valuable consideration. This cannot be called a trust estate. There was an eventual interest in *Wright*, but the whole property was inadequate to the indemnity of the plaintiffs. There is nothing to distinguish this from the ordinary case for a transfer of a valuable consideration. There was no lingering equity remaining in *Wright*. The spirit of the deed was, that the plaintiffs were to have absolute control of the property. How were they to get indemnity, unless they had such control, provided the deed was upon such a consideration which the law will sanction? Here was a proper consideration—sureties to be indemnified. There is no transaction which the law will sanction sooner than this. The law does not condemn it. The commerce of the country depends upon a wide spread credit. How is credit to be obtained unless there is security? The law will allow that he who gives his aid to credit shall be secured, where no interest is asked for his securityship. He asks indemnity, and shall he be refused? Is it not for the public good that the surety shall be indemnified? That when the principal is tottering upon the verge of ruin, he may step forward and secure him who had pledged his fortune in his behalf? It is the first axiom in commercial transactions. The law will justify the making the indem-

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nity. Will the postponing it to the last moment make any difference? The principal is bound to indemnify; and when a man becomes a surety for another, the principal is bound, and engages at the time, to indemnify him to the extent of his resources. Sureties in every case should be protected, where there is nothing in the case which stains it with impurity. Here nothing of the kind is attempted to be shown. Our insolvent law is as hifting and changeable system—it is one thing to day, and another to-morrow. There is no uniform system in it. Resort must be had to what was the system before.

Finkney, also for the Appellees. On the *second* and *fifth* bills of exceptions. 1. How did the case stand at the time institution of the proceedings in *Martinique*? At the time of the commencement of those proceedings, and independently of the judgment, the plaintiffs had a right to recover, 1st. Under the assignment of the bill of lading. A bill of lading is assignable in its nature, and by endorsement the property is vested in the assignee. It is clearly settled, that goods at sea may be so assigned. *Evans vs. Marlett*, 1 *Ld. Raym.* 271. *Wright vs. Campbell*, 4 *Burr.* 2051. *Caldwell vs. Ball*, 1 *T. R.* 216. *Lickbarrow vs. Mason*, 2 *T. R.* 74. 5 S. C. *T. R.* 683. *Haille vs. Smith*, 1 *Bos. & Pull.* 569. *Newson vs. Thornton*, 6 *East*, 20, 27. Upon this principle the property of the goods at sea is held by the possession of the bill of lading, and the legal interest of the property is immediately transferred from the owner to the assignee of the consignee, (*a fortiori* to his own assignee.) *Pow. on Mortg.* 35, 36. In this case *Wright*, the vendee, represents the consignee for value in the cases cited. His consignee was merely a factor for sales and returns, and as consignor and owner he retained power and right to transfer to the plaintiffs. 2d. Under the deed from *Wright* to them of the 24th of August 1810, which was duly acknowledged and recorded. The consideration was a valuable one, and as meritorious as it could be. *Lempriere vs. Pasley*, 2 *T. R.* 485. 3 *Bac. Ab.* 310. *Twines* case, 3 *Coke*, 80. *United States vs. Hooe*, 3 *Cranch*, 88. *Pow. on Mortg.* 41, 42. *Coxe vs. Harden*, 4 *East*, 212, 217. 5 *Bac. Ab.* tit. *Mortgage*, 52, cites *Plumb vs. Fluitt*, 2 *Anstr.* 432.

2. What were the defendants rights at law? Having sold and delivered the flour, it is impossible that they could have more than two rights at law, supposing no fraud in *Wright*, or even if there was, 1st. Of stopping *in transitu*, which affects the thing specifically. 2d Of attaching for the debt, as any other creditor might do. 1. They had not the right of *stopping in transitu*. At common law their property was gone by a constructive delivery, and they were reduced to general creditors. The right of stopping *in transitu* was transferred from equity to law. It took its rise with the case of *Snee vs. Prescott*, 1 *Atk.* 245, by Lord *Hardwicke*, and is an equitable specific lien

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upon the thing of which the property has passed by another, and goes as far at law as at equity. It exists only in the case of the insolvency of the vendee. It never does or can exist after *actual* delivery to the vendee or consignee. It is an ambulatory right, which follows the property in its transit from the vendor to the vendee or consignee, and then ceases for ever. *Constructive* delivery, (which may be sufficient to alter the property,) does not interfere with it. *Actual* delivery extinguishes it. Now in this case there was *actual* delivery to *Wright* in *Baltimore*, and of course the right of stopping *in transitu* is a chimera. There was no transit to *Wright* in the case. The only material transit was from the vendors to *Wright*. The subsequent transit to *Martinique* was *from Wright*, not *to* him. *Abbott*, 352, 358. 6 *Rob. Adm. Rep.* 326. *Ellis vs. Hunt*, 3 *T. R.* 464. *Leeds vs. Wright*, 3 *Bos. & Pull*, 320. *Coxe vs. Harden*, 4 *East*, 217. The right of the vendor to stop *in transitu*, in case of the insolvency of the vendee, was a kind of equitable lien adopted by the law, for the purposes of substantial justice, and does not proceed on the ground of rescinding the contract. *Hodgson vs. Loy*, 7 *T. R.* 441. *Salomons vs. Nissen*, 2 *T. R.* 679. *Lickbarrow vs. Mason*, *Ibid* 70, 75, 683. There was no right, therefore, of stopping *in transitu*, upon which it is observable the court in *Martinique* proceeded. 2. The other legal right at the time of the commencement of the proceeding in *Martinique*, was of *attaching* as a creditor. But that right could not exist for two reasons—1st. The debt was not due. 2d. The property was altered before the defendants proceeded. It belonged to the plaintiffs; and moreover the court at *Martinique* did not decide upon this ground. The defendants had no legal right of any kind therefore, when they commenced their proceeding in *Martinique*. 1. They had not any property in the flour, for they had sold and delivered it to *Wright*. 2. They had not the right of revendication or stopping *in transitu*, because of the actual delivery and possession, independently of the right of the plaintiffs. 3. They had not a right to attach, because their debt was not due, and because the property was passed to third persons.

3. What was the comparative *equity* at the same epoch, that is, at the commencement of the proceedings in *Martinique?* 1. As to the general equity. The plaintiffs' is that of a *security*; the defendants' of a creditor, who sold upon a long credit for profit, or with the expectation of profit. The thing sold is that which they attempt to affect for the purchase money; but that thing had become a portion of the mass of *Wright's* property, and they had taken a security, or note of hand, at 85 days, in lieu of it, and had thus become, and intended to become, mere general creditors. The general equity is at least *equal*. A security is always favoured in equity, and chancery will never raise an equity against him. which the *law*, strictly taken, does not raise. If a security in a *joint* bond dies, and the sur-

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viving obligor becomes insolvent, the bond cannot be set up against the security's property in equity, although it could be done against any other joint obligor. If there is any moral obligation which presses more than another upon a trader, it is to indemnify his securities, at least there can be none superior to it. A security becomes so from mere friendship, without hope of profit. He risks himself without the chance or expectation of equivalent, and oftentimes at the imminent hazard of run. The whole fabric of our commerce has depended upon securityships, bank negotiations, &c. and it is the fixed idea in the commercial world, that a man cannot do too much for indemnifying his securities. It is in fact the consideration, and the only one, which is paid for securityship. On the other hand the defendants sold for profit; they were not led by friendship, but influenced by calculation. What peculiar favour are they entitled to against those who had staked their whole fortunes, and the prosperity of their families, upon the success of *Wright*? There can be no impeachment of the defendants that they expected profit; but it is a reason why they have no moral claims *above the plaintiffs*. The property had been theirs indeed—but what then? It was theirs no longer—they had made it as much *Wright's* as any other of his goods; and had chosen to rely on his personal credit and solvency. The *general equity* is therefore at least equal. Now what *specific equity* had the defendants? It has been said that they had an *equitable lien beyond the right of stopping in transitu*. 1 All the cases upon the right of stopping *in transitu*, show clearly that it is the *ne plus ultra of equity, as well as of law* The chancery cases do not go beyond it. *Snee vs. Prescott*, 1 *Atk.* 245, did not. Suppose, however, that by analogy to the doctrine of lien for the purchase money in the case of *real estates*, this lien exists. It may be answered, 1. Even in the case of real estates, the lien, by implication, does not exist, where upon the contract it evidently was *not intended to be reserved. Austin vs. Halsey*, 6 *Ves.* 481. Now here it was not intended to be reserved; for a note of hand is taken *with a long credit*, and a knowledge that the goods wrre intended to be sent out of reach. And it has in one case, *(Fawell vs. Heulis, Ambl.* 724. S. C. *Dickins*, 485, determined in 1773.) been decided, that in the case of the sale of real estate, if the vendor parts with it, and takes a bond for the purchase money, he has no lien against the general creditors of the vendee. There is no case that overrules this. The case of *Nairn vs. Prowse*, 6 *Ves.* 759, does not affect it; for the master of the rolls decided no more than the case required, that is, that the taking *a security* did take away the lien by implication. The case of *Pollexfen vs. Moore*, 3 *Atk.* 273, was that of an *agreement* to purchase merely. 5 *Vin Ab.* (supp.) 180. 2. But at any rate there is no lien by implication against a holder for value, *without notice of the equity*. All the books agree to this,

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and it would be nonsense and iniquity if it were otherwise A vendor has a lien for the purchase money *while the estate is in the hands of the vendee*; that is, against general creditors. *Austen vs. Halsey*, 6 *Ves.* 480. Now the plaintiffs were holders for value, (upon a consideration the most meritorious,) *without notice of the defendants' equity.* There is no notice stated in the bills of exceptions, and *de non apparentibus et non existentibus eadem est ratio.* They must show notice if they mean to stand against a legal title upon a claim merely equitable. This is so at equity. Even, therefore, if real estate, this idea of lien, beyond the right of stopping *in transitu*, could not be countenanced. But the doctrine, as it applies to real estates, has nothing to do with this case, which is of personalty. There is no adjudication or dictum to be produced which looks that way. Cases of *stopping in transitu* profess to exhaust the equitable doctrine as it applies to personal things; and *Ex parte Gwynne*, 12 *Ves.* 383, proves that to be so. And besides, the cases of stopping *in transitu* show, that *even while the goods are in transitu*, if they are transferred by the consignee or vendee to a third person for valuable consideration, (especially if without notice of the equity,) the right to stop *in transitu* is gone. This *while in transitu*; for after they reach the vendee or consignee, there is no right of revendication at all—there is no lien of any kind at law, nor in equity. It results, that the plaintiffs and defendants were in *equal* equity; and that so being in equal equity, the plaintiffs obtained the title at law—thus uniting law and equity. It results again, as will be shown, that unless the judicial sentence in *Martinique* is competent to prevent it, the plaintiffs are entitled to recover, *in this form of action*, the money which belonged to them, which the defendants got into their possession under pretence of title. There are only two possible objections—1. That in this form of action the plaintiffs can recover only upon equitable principles. 2. That there was no privity—the money having been received under an adversary title. 1st. As to equitable principles. The rule in chancery is, that where the equity is equal, he who has the law shall prevail. Per Lord Chancellor *Cowper*, in *Oswicke vs. Plumer*, 5 *Bac. Ab.* 41. 42, Per *Ashurst*, J. in *Caldwell vs. Ball*, 1 *T. R.* 241. Nay, where one equity is prior to the other, but in other respects equal, the last equity shall prevail if it becomes united to a legal title, against the maxim "*qui prior est in tempore potior est in jure.*" Thus where the second mortgagee purchases in (even with notice of the first mortgage,) an incumbrance *anterior* to the first mortgage, he shall overreach the first mortgage in equity. 5 *Bac Ab.* 55, 56. Nay, where it is only a general equity against a specific equity, if, *without notice of the specific equity*, the other party gets a title at law, he shall prevail against the specific equity. Thus—"although a deposit of title deeds

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amounts to an equitable mortgage, yet if a creditor of the mortgagor, fearing his immediate insolvency, take a conveyance of the same estate *without notice of the incumbrance*, equity will not prevent him from availing himself of his legal estate." 5 *Bac. Ab.* 53. *Plumb vs. Fluitt*, 2 *Anst.* 432. So that even if the defendants had a specific equity, since the plaintiffs as *securities*, (stronger than the case of a mere *creditor*,) got the legal title *without notice of their equity*, it would not be repugnant to equitable principles that they should be allowed to have the benefit of their legal title. The defendants, however, had no specific equity. They had no equity superior to that of the plaintiffs, who have united the law to their equity. Again —Where there is no peculiar equity on either side, the strict law shall entitle the plaintiffs to a verdict. *De Hayn vs. Hartley*, 1 *T. R.* 343. There is no necessity, therefore, that there should be any peculiar equity with the plaintiffs. It is sufficient if the law is with them, and the claim is not condemned by conscience and honesty. Here it is not so condemned. 2. The want of privity. The rule is, "in an action for money had and received the receipt shall be always deemed to enure to the use of him who hath the right, even though it be taken under an adverse title; as for instance, when this species of action is brought to try the title of an office." *Philips vs. Hunter*, 2 *H. Blk. Rep.* 408. 1 *Vin. Ab.* 268, *(N. 2.) pl* 1. 2. *Howard vs. Wood*, 2 *Show.* 21, 24. *Tettenhan vs Bedingfield*, 3 *Leon.* 24. *Arris vs. Stukets*, 2 *Mod.* 360. 1 *Vin. Ab. (Supp.)* 99, *(N. 2.) pl.* 2, 4; 103. *pl* 10. *Thomas vs. Whip*, *Bull. N. P.* 130. *Hern vs. Nichols*, 1 *Salk.* 289. *Bull. N. P.* 35. 2 *Com. on Cont.* 44. *Moses vs. Macferlan*, 2 *Burr.* 1009 *Astley vs. Reynolds*, 2 *Stra.* 915. *The King vs. The Bishop of Chester*, 1. *T R.* 403, 399, *(and note.)* 1 *Bac. Ab.* 260. *Jacobs vs. Allen*, 1 *Salk* 27. 1 *Vin. Ab.* 263, *(N) pl.* 2.

4. We come now to consider the effect of the judicial proceeding in *Martinique*. Has it any, and what effect, upon the right of the plaintiffs to recover? The defendants set it up as a flat bar. They say it has decided the matter of the present controversy, and that the plaintiffs cannot recover against a judicial decision, even though a *foreign* decision .We say it is no more than *prima facie* evidence, and scarcely that. 1. In strictness, the courts of one country are not in any degree bound by the judgments of the courts of another. This is the result of their independence and sovereignty, as well with regard to judicial, as to executive and legislative acts. If they are bound by the judicial acts, they are bound by the legislative acts; for the judiciary does but expound, apply, and enforce the legislative will. *Lord Kaime's Pr. of Eq.* 374. But *comity* has in *England* given to them a qualified binding force of considerable extent. And here it ought to be observed, that in *Scotland*, in *France*, and the other nations of *Europe*, no such comity exists. *Ibid.* In *France* a

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judgment rendered in this country would not be received as conclusive, and in *Martinique* it would not. And are we to take theirs as conclusive upon notions of *comity*, which are not reciprocal? *Comity*, however, has never in *England* made such a judgment as this conclusive. The general doctrine shall be shown bye and bye, at present the peculiar reasons will be given why this proceeding cannot affect the plaintiffs—1. *The plaintiffs were no parties to it.* By the record it appears that the vessel and cargo were seized on the 6th of October 1810, by an order of the 5th, at the instance of the defendants, and others. Their petition stating their right and claim, &c. on the 9th, and a final judgment in their favour on the 11th. Upon this judgment the defendants now stand; under it they received the money. There was no new judgment pronounced. This is obvious from the sentence of the 11th and that of the 16th. *B. Nicholson* arrived after the first judgment. He had no choice but to remonstrate and ask a revision, &c. and he did so; but the court refused to annul it; and so it was executed. If he had not remonstrated, the judgment would have been executed, and his remonstrance produced no change. This did not make the plaintiffs parties to a judgment which had been passed before their agent arrived. A foreign judgment cannot have greater force than a domestic judgment of a court not of record; and such a judgment does not generally bind those who are not parties. 1. Decrees of the court of chancery 2. Ecclesiastical courts. In the *Dutchess of Kingston's* case, 11 *St. Tr.* 243, a sentence or jactitation of marriage was not conclusive, because it was offered against other parties, (in a prosecution for bigamy,) also *per fraudem*. The maxim of law is, "*res inter alios acta tertius nec nocet nec prodest.*" It would be monstrous if it were otherwise. It may be said that admiralty sentences, in cases of prize, show the contrary. This is upon the presumption that all the world are *parties* to prize causes; and it fortifies what is contended for on the part of the plaintiffs. *Croudson vs. Leonard*, 4 *Cranch.* 437. But the conclusiveness of admiralty sentences, (*in personam* as well as *in rem*,) is an anomaly now almost universally condemned. In *Lothian vs. Henderson*, 3 *Bos. & Pull.* 499, which went up to the House of Lords, and in which all the judges delivered their opinions *seriatem*, it appears that almost all of them condemned the doctrine, although they considered themselves bound by positive decisions to adhere to it; and Baron *Grahame* gave his opinion against it. In *Fisher v. Ogle*, 1 *Camph.* 418. *Park*, 494, 6, 7, and 1 *Marsh.* 435, Lord *Ellenborough* calls it *an overstrained comity;* and in *Donaldson vs. Thompson*, 1 *Camph.* 429, 1 *Marsh.* 435, he says, "I am by no means disposed to extend the comity which has been shown to these sentences of foreign admiralty courts. I shall die, like Lord *Thurlow*, in the belief that they ought never to have been admitted. The doctrine in their favour rests upon an authority of *Hughs*

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v. Cornelius, 2 *Showers*, 232, which does not fully support it, and the practice of receiving them often leads to the greatest injustice." In the *United States*, some of the state courts have rejected the doctrine; and such as have admitted it, have relied upon grounds peculiar to admiralty sentences, and have reluctantly received it after all. However this may be, the reason of the doctrine maintains the objection that the plaintiffs, not being parties to the judgment at *Martinique*, under which the defendants claim, they are not bound by it. In truth, with reference to the personal rights of *Maryland*, citizens out of the jurisdiction of the court, the court had no jurisdiction, (except as they might be affected by jurisdiction over the thing.) Even Lord *Kenyon* admits this in his remarks on Lord *Hardwicke's* observations about the *Welch* decree. *Galbraith vs. Neville*, 1 *Dougl.* 6, *(note)*. And in the latter part of his opinion he says, the foreign courts must have competent *jurisdiction*. Now here the court in *Martinique* had none over the plaintiffs, and therefore could not affect their rights. And here may interpose a short inquiry. The rights were personal, and the court of *Martinique* had no jurisdiction over their persons. It might do as it pleased with the *thing* while in its power; but the *rights and interest in the American proprietors*, it could not reach, because they were not in its power or amenable to it. The *thing* being in *Martinique*, it could act upon it and bind it by a proceeding *in rem*, so as to protect purchasers, and force the proceeds into whose hands it thought fit. But there the power stopped. The reciprocal rights and obligations of the present plaintiffs and defendants remained as they were; for the judgment could not act *in personam*—the parties not being amenable to the jurisdiction. The judgment, therefore, produced the effect of putting the money into the hands of the defendants by means of power over the thing; but having accomplished that result, the conflict between the *personal rights* of the *plaintiffs and defendants* passes *ad aliud examen*, and falls again (where indeed it always was,) under the jurisdiction of the law of this state, which created, defined and regulated them. In a word, the judgment did all that power over the *thing* enabled it to do. It could do nothing to change the relative personal claims of the plaintiffs and defendants, because it had no jurisdiction over the persons in whom those claims inhered. 2. But even supposing they were parties in form, can *comity* bind this court to shut its eyes to the substance of the fact? Was *B. Nicholson* authorised to make the plaintiffs parties? Look at his authority, as recorded in the proceeding. Nothing of the sort was intended or thought of. His business lay with the consignee or factor, and he could anticipate no dispute with him. He had the assignment of the bill of lading, and letters to *Marean*, &c. But moreover, look at the rapidity with which this proceeding went on. In *two days* after filing the petition by the defendants, judgment was pronounced. In *four days* after, *B. Nicholson* entered his remonstrance; his

remonstrance is overruled. He arrives on the 11th, and is compelled immediately to remonstrate, and in four days is dismissed, and with a fine. They were not a party to any purpose. 3. But the great objection is, that the judgment *upon the face of it*, is *manifestly unfit to be adopted as conclusive*, and that *consistently with it the present plaintiffs may recover*. Either this judgment is in the nature of a judgment on attachment, or it is founded upon the right of revendication before spoken of, as belonging to the *vendeur primitif*. It is expressly said to be the last of these upon the face of the proceeding itself, and so we must take it to be. If it had been the first, it had been palpably unjust, since the property appeared to be vested in the plaintiffs, and the note to the defendants was not due. Now we have already seen, that by the law of this state the *vendeur primitif* had no lien—no right of *revendication*. That the delivery to, and possession of *Wright*, had taken them away, and that the property, having passed to the plaintiffs for value, there could be no pretence for lien or revendication, even if the goods were *in transitu*, as they were not. Let us now inquire then—1. By what law the rights of the plaintiffs and defendants ought to be decided? Whether they depend on the law of this state, or that of *Martinique*? And 2. By what law the court of *Martinique* undertook to decide them? 1. The reciprocal rights of these plaintiffs and defendants depended altogether upon the law of this state—*Lex domicilii*. 1. Because the law of their domicil. 2. Because the law of the transaction—*Lex rei gesta*; for it was entirely a *Maryland* transaction—begun there and intended to end there—passing through *Martinique* for a moment. 1. The parties were citizens of this state, and the transaction was a *Maryland* transaction. Law of the domicil and the *lex rei gesta* the same, and ought to have been applied to the case. *Burrows vs. Jemino*, 2 *Stra.* 733. 12 *Vin. Ab.* 17, pl. 9. *De Sobry vs. Terrier*, 2 *Harr. & Johns* 191. Rights to personal things *follow the domicil of the parties*. Succession *ab intestato*, &c. So a transaction may depend on the place where carried on, and intended to be concluded. *Sill vs. Worswicke*, 1 *H. Blk. Rep.* 690. *Philips vs. Hunter*, 2 *H. Blk. Rep.* 406. *Piper vs. Piper*, *Ambl.* 25. *Thorn vs Watkins*, 2 *Ves* 35. In our case it is undeniable that the parties could have had no rights but such as the law of this state gave. They were all citizens of this state, acting as *Maryland* merchants. The sale of the flour—the note of hand payable in *Baltimore*—the delivery of the flour—shipment—assignment of the bill of lading—deed of trust—all *Maryland* acts, looking to the law of *Maryland* peculiarly and exclusively. It was intended, to be sure, by *Wright*, that the flour should go to *Martinique*, and be there sold; but returns were intended, and therefore the whole affair was intended to *end* as it had been begun and carried on in this state. But the court in *Martinique* has confessedly, upon the face of the judgment, applied the law of that Island to the case. Is it fit that the law of that Island

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should supplant the law of *Maryland*? Is it not unjust? It is consistent with the duty of this court to take what it sees to be a *French* rule for a guide, where the law of this state ought alone to determine? It is contended that it is unjust, and that this injustice and impropriety appear *upon the face of the French proceeding*. *Buchanan vs. Rucker*, 1 *Campb.* 63, 180, b. Now here there is a vice on the face of the proceeding. It professes to adjudicate by a law which has nothing to do with the rights of the parties. This is the grossest injustice, which the administrators of the law really applicable to those rights, cannot and will not tolerate. They must abdicate their duty first. Let it be remembered, that no foreign judgment is binding in itself. It is *comity* alone to which it owes the respect which is paid to it. The great reason why a foreign sentence binds at all, even from *comity*, is that the foreign tribunal is presumed to understand the law of the case; that is, the law by which itself is bound, or of its own country, better than the court before which the foreign sentence is produced. As if the sentence turns upon a point of local law properly applicable to the subject, it ought to be respected, because it is of much greater authority to show what that law is, than any other which can be produced. This reason presumes, however, that it is the local law which ought to give the rule, and consequently does not apply where the decision ought not to be upon the law of the place where the first tribunal sits. For example, in this case, the rule ought not to have been the law of *Martinique*—the *lex rei scitæ*, but *the law of Maryland*—the *lex domicilii* and the *lex rei gesta*. The court of *Martinique* knew nothing of the law of *Maryland*, and did not profess to apply it. This court understands that law. By receiving the sentence then as conclusive, this court invert the motive. This court receives the foreign sentence, because the foreign court is supposed to know the law of the case—the *lex loci*, better than this court. But here confessedly the foreign court knew nothing of the law of the case, (as it was not the *lex loci*,) and it is this court that knows it. This court then is called upon to take their ignorance for its guide, and to give up its own peculiar knowledge to *comity*, upon the foundation of a rule which intended to provide for the court's *instruction*, not for its *stultification*. Such *comity* would be a crime. It would be to give to a petty tribunal in *Martinique* a power to repeal the law of this state—to trammel our judicatures—to fix its patches upon our jurisprudence, and wrest our rightful jurisdiction from us. Let us look again at the case of *Burrows vs. Jemino*, 2 *Stra.* 733 1. The thing and the parties were within the jurisdiction of the court at *Leghorn*; and 2. "The Lord Chancellor was clearly of opinion, that this cause was to be determined *according* to the local laws of the place where the bill was negotiated," &c. And hence he considered the decision of the court, administering that local law, binding upon

him. It was the highest evidence of that law, by which the case ought to be decided. Is this so here? Who will maintain that the law of *Martinique* ought to be the rule on this occasion; or that a *Martinique* sentence ought to bind, because it furnishes the best evidence of that law, in a case where that law ought to have no effect whatsoever? The judgment of the court of *Martinique* is erroneous on the face of it, as applying a law which was not applicable. So in the case of an award, if an error in law appears on the face of it, although the judges are of the parties own choosing. But 2. The plaintiffs may recover consistently with that judgment. The first judgment has nothing to do with the plaintiffs' rights. It acts only on those of the defendants, as they represented them. The rights of the plaintiffs may therefore, without violence to that judgment, be now enforced Let the first judgment conclude as far as it goes, and what does it say? That (without looking to the rights of the plaintiffs,) the defendants ought to be paid out of the proceeds of the flour. Be it so; but we are *now* looking to the plaintiffs' rights, upon which that judgment says nothing, and against which of course it can conclude nothing. Push it as far as it can go, and the plaintiffs are clear of it. But suppose the opinion pronounced upon the plaintiffs' rights in the second judgment, (under which it is always to be observed the defendants do not claim,) is taken in, and what does *that* amount to, taken in connexion with the first, and interpreted as largely as possible? Simply, that *by the law of Martinique*, (which that court believed itself bound by,) it was of opinion that the defendants were entitled to be paid. Agreed—but it is consistent with that opinion to give the plaintiffs redress *by the law of Maryland*. That opinion may be correct, and yet the plaintiffs may be entitled to recover. It may *conclude*, and yet the defendants may be obliged to refund. It may be true that by the law of *Martinique* the defendants had the right of revendication, and to take in satisfaction of their debt the property of the plaintiffs, and it may also be true, that by *the law of Maryland* they ought to refund to the plaintiffs what, by that law, belongs to them. As an evidence of local law let the foreign opinion be respected, (and it claims to be no more than an opinion upon local law;) but if the case is out of that foreign law, and belongs to the *domestic code*, the turn of this court to adjudicate upon the merits, has now arrived without any disrespect to that opinion; and it is now the province of this court to apply the *domestic rule*, not hitherto touched by any judgment, and consequently perfectly at large. In a word, the whole of this case is open without impeaching the judgment at *Martinique*, which has never decided upon the rights of these parties by any law on which they depended. That decision remains to be given here. And here the case of *Moses vs. Macferlan*, 2 *Burr.* 1009, is in point, where it was said—"The ground of this action is consistent with the judgment of the court of conscience. It

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admits the commissioners did right. They decreed upon the endorsement of the notes by the plaintiff, which endorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence." "The ground of this action is, not *that the judgment was wrong*, but that *(for a reason* which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money." Now here the opinion is not impeached, that "*by the law of Martinique* the defendants ought to have recovered." The plaintiffs only insist, that by the *law of this state*, which furnishes the true rule, *but of which in the court of Martinique the plaintiffs could not avail themselves*, the defendants ought not to have recovered, and therefore cannot now in justice keep the money. And observe too, that in *Moses vs. Macferlan*, the parties before the court of King's Bench, were the same parties who were before the court of conscience. The tribunals were both domestic—the jurisdiction of the first tribunal was complete, and was not denied, yet as the point upon which the plaintiff claimed in King's Bench had not been denied in the court of conscience, although it was material to the merits, the former court thought itself not precluded from going into it. In the present case there are different parties—the tribunal foreign—the jurisdiction denied. The authority of *Moses vs. Macferlan* may be vindicated against the opinion of Ch. J. *Eyre*, in *Phillips vs. Hunter*; and it is an authority to show, that *want of privity* is nothing in this action, and that even a *recovery in an adverse suit* is nothing. 3. But that the defendants cannot hold this money upon the *Martinique* judgment, because they obtained possession of it *against the law by which they were bound*, which law, (the law of *Maryland.*) gave it to the plaintiffs. As between them and the plaintiffs the law of this state is the rule and measure of their rights. Both were bound by that law. The defendants have resorted to a *Martinique* tribunal to get rid of that law, and to violate those rights. The very production of such a sentence is a wrongful act. It is *in fraudem legis.* The law of *Maryland* says, "you shall not seize or obtain payment of your debt out of this flour." By a direct infraction of that law, they have made use of a foreign tribunal, ignorant of the law of *Maryland*, and unwilling to apply it, to seize the flour, and obtain payment of their debt out of the proceeds. They sail against the wind and tide of the law, by which they are bound—by which the transaction was impressed. They bid defiance to it, and set up a trick and an evasion against it. It is impossible that any thing which deserves the name of jurisprudence can suffer this. Such, will be shown, are the authorities—the best weighed and most maturely considered. But before that is done, let us take a slight view of the general authorities respecting foreign judgments, upon which the defendants have relied. The cases are all collected in 1 *Dougl. (in a note,)* from page 4 to 6, subjoin-

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ed to the case of *Walker vs. Witter*, which is itself an authority upon this matter, where Lord *Mansfield* says, "foreign judgments are a ground of action every where; *but they are examinable.*" *Crawford vs. Whittal*, (in the note) is to the same effect. In *Sinclair vs. Frazer*, (also in the note,) it is said to be *prima facie* evidence, and that it lies on the defendant to impeach the justice thereof, or to show the same to have been *irregularly or unduly obtained*. *Plaistow vs. Van Uxem*, (also in the note,) is to the same effect. In *Galbraith vs. Neville*, (also in the note,) Lord *Kenyon* was for making it conclusive. *Buller*, J. "A foreign judgment is conclusive till impeached by the other party." "A foreign judgment is only to be taken to be right *prima facie*; that is, we will allow the same force to a foreign judgment that we do to those of our own courts not of record." "In short, the result is this, that it is *prima facie* evidence of the justice of the demand in an action of *assumpsit, having no more credit than is given to every species of written agreement*, viz.—That it shall be considered as good until impeached." It is clear then, from all these general authorities, that if the defendants were plaintiffs, to obtain here the effect of their judgment in *Martinique*, they could only use it as *prima facie* evidence. Why should they have a larger benefit from it when they offer and rely upon it as defendants? In none of the cases is this distinction taken, until it was taken by Ch. J. *Eyre*, in *Philips vs. Hunter*, 2 *H. Blk. Rep.* 402, and there he was overruled by all the judges in the Exchequer Chamber, and Lord *Loughborough* was against him in the common pleas. *Buller*, J. indeed, attributes to Lord *Hardwicke* such a distinction in the case of the *Welch* decree, affirmed by the House of Lords. But that was a case in chancery, and turned upon the maxim, that he who seeks equity shall first do it. And moreover it was a domestic decree by reason of its affirmance by the House of Lords, and quite impossible that Lord *Hardwicke* should disturb it. It was going a great way to say, that if he was called upon to enforce it, he would examine into its merits. The distinction is in itself unfounded and idle. If the judgment is good as a defence, it is good as a claim. In both cases this court is called upon to respect and enforce the foreign judgment. Independently of that judgment the plaintiffs have a right to recover. The defendants set up the judgment to take away that right, and consequently ask the court to give effect to it. Does he who pleads a bond as a discount, less call upon the court to set up and enforce the bond, than he who brings an action upon it; and will the bond do in the one case what it will not do in the other? Either the foreign judgment is binding in its own nature, or it is not. If it is binding, it ought to be enforced for a plaintiff as well as a defendant; if it is not binding, this court cannot make it so. The defendants say this judgment is conclusive. How? In itself?—No, for then it would be conclusive for

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a plaintiff. How then? No answer can be given. Do they not ask an effect for this judgment? Must you not *give effect* to it (if you do as they ask,) by your judgment? Could you give greater effect to it on behalf of a plaintiff? They do not rely upon the mere *vis inertiæ* of this foreign judgment. They rely upon your adoption of it—Upon your forming an alliance with it—Upon your reinforcing it by your own judicial aid—Upon your communicating to it life and strength and power. Put this foreign judgment out of the way, and have the defendants any case? None. Upon what then do they lean but upon this judgment? And what is this judgment if you do not execute and enforce it against the plaintiffs to the destruction of their case? We come now to the cases of attachment decided in *England* in favour of assignees against general creditors, which are absolutely conclusive. *Hunter vs. Potts*, 4 *T. R* 182. *Sill vs. Worswick*, 1 *H. Blk. Rep.* 665. *Philips vs. Hunter*, 2 *H. Blk. Rep.* 402. This last case was error in the exchequer chamber, from a judgment in King's Bench in a case decided immediately after *Hunter v. Potts*, which was considered as settling the law. In *Hunter v. Potts*, the whole argument of the court proceeds upon a supposition, that if the owner (the bankrupt,) had himself assigned, in the usual course of business, his assignee might recover, *which is exactly our case.* In that case both parties were *English* subjects, &c. In *Sill vs. Worswick* the court say, "personal property has no locality, but is subject to that law which governs the person of the owner." Our case is more favourable than *Philips vs. Hunter*, because the property here went from *America*, and was on its way back through *Martinique.* In *Philips vs. Hunter* it was not so, the defendant in that action brought it to *England* by means of his attachment, and it might not have got there otherwise. In that case all the parties were *English* traders, and *English* subjects. The debt from the bankrupt to the defendant was contracted in *England.* It was a case between *English* subjects upon *English* property. So here in our case, the parties are *Maryland* traders, and *Maryland* citizens. The debt from *Wright* to the defendants was contracted in *Maryland.* It was a case more emphatically between *Maryland* citizens, upon *Maryland* property, for not only the debt to the defendants was contracted in *Maryland*, but the property, out of which they took payment, was shipped in *Maryland*, and was to return to *Maryland.* In *Philips vs. Hunter*, the court compares the case under the bankrupt law to a transfer by the bankrupt himself, which it takes for granted would defeat the attachment. They say the parties were bound by the law of their own country. That applies exactly here. The opinion of *Eyre*, Ch. J. (who differed with the court,) sets out upon a false assumption, that the plaintiff's demand must be judged of according to the law of the foreign tribunal.

Curia adv. vult.

At this term the opinion of the court was delivered by 1815.

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CHASE, Ch. J. This opinion the Reporters regret they have not been able to procure. The result of it however, was, that this court dissented from the opinion of the court below in the *first* bill of exceptions, and concurred with that court in the opinions in the *second* and *fifth* bills of exceptions.

BUCHANAN, J. dissenting from the opinion of the court, delivered the following opinion: I regret that I cannot unite with my brethren in the judgment pronounced in this cause, but will endeavour to give my view of the subject, in which I have the less confidence, being unsupported by the opinion of either of the other members of the court, on the principal question presented for consideration.

This case is brought up on three bills of exceptions, No. 1, 2 & 5, in the record, taken at the trial, on the part of *Owings* and *Cheston*, the appellants. The exceptions No. 3 & 4, taken on the part of the appellees being waived, and forming no part of the subject of this appeal, have not been examined into.

The question growing out of the first bill of exceptions is, whether parol evidence of a foreign judgment can be received? And I think the court, before whom the case was tried, did right in not suffering such evidence to go to the jury. It is not to be questioned, that if a foreign judgment had been produced, *Benjamin Noland* might have given evidence that the money he received was paid in pursuance of that judgment. But no such judgment, or copy of such judgment, being produced, the circumstance that he had been examined on the part of *Nicholson* and *Williams*, to prove that he had received the money in question from *Tuttle*, and paid it over to *Owings* and *Cheston*, affords no foundation for letting in his deposition, taken on a cross examination by them, to prove that proceedings were instituted in a court at *St. Pierres*, to which *Nicholson* and *Williams* were parties, and that a sale of the property proceeded against, was definitively decreed for the payment of the claim of *Owings* and *Cheston*, and others. That was the testimony offered, and if it had been received, there would have been no necessity for producing the judgment to enable the court to see who were parties, and what was decided by it, and thereby to judge of its legal effect; since it would have been already proved, that the proceedings were *in rem*, that *Nicholson* and *Williams* were parties to those proceedings, and that the judgment was against the thing, the proceeds of which form the matter of controversy in this suit, and the effect of the judgment, to be collected, not from evidence offered by the judgment itself, but from *Noland's* loose impressions of its import; which would be subversive of the established rule of evidence, that authenticated copies of records are

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required, in the absence of the originals, as the next best evidence, and cannot be supplied by parol. And the whole of a record, and not a partial extract, must be produced, in order that the court may be put in possession of the full effect of it; for a part only may have an import, materially different from the whole taken together; and the object, with a view to which the whole record is required, would be equally defeated, by the admission of parol evidence. And so with regard to proceeding in foreign courts, the reason and the law are the same. It is to the rejection of the evidence offered, of the proceedings and judgment in *Martinique*, that the exception is to be considered as taken, and not the admission of the process, that *Noland* received the money, in the character, and under the impressions, stated in his deposition, by which *Owings* and *Cheston* were in no way prejudiced. And as *Noland's* impressions were not very material, I have not examined how far the court was right in suffering them to go to the jury, and shall not, for that reason, quarrel with the opinion.

There are two questions arising on the *second* bill of exceptions—1. Whether the assignment by *Wright* of the 24th August to *Nicholson* and *Williams*, of the bill of lading, and his deed to them of the same date, passed the property in the cargo of the brig *Hunter* to them. And 2. If they did, whether they can, in this form of action, recover from *Owings* and *Cheston*, so much of the proceeds of the cargo as was received by *Noland* from *Tuttle*, and by him paid over to them.

In support of the negative of the *first* proposition, it is contended—1st. That *Wright* purchased the flour, which formed the cargo, in contemplation of failure, with a view to secure *Nicholson* and *Williams* against certain liabilities incurred by them on his account. That the purchase was fraudulent and void, and therefore that the property in the flour did not pass, and not being in him, he could not transfer it to another: And 2d. That if *Wright* did acquire a property in the goods, his assignment and deed to *Nicholson* and *Williams*, amounted to an undue preference, to the prejudice of other creditors, and were therefore void. But neither of these positions can be sustained. If it should be admitted, that a purchase of goods, in contemplation of failure, and with a view to secure a favoured creditor, would in law be fraudulent and void, yet the principle would not reach this case. It no where appears that *Wright* either was, or supposed himself to be in insolvent circumstances, or in danger of failure, at the time he purchased the flour; or that he made the purchase with a view to secure *Nicholson* and *Williams* in preference to other creditors. But the converse may be collected from the facts in the cause; for it is in proof, that he had purchased from *Owings* and *Cheston* more flour than that, for which his note to them was given; but that the vessel he was about to load, not being able to carry the whole, he re-

turned to them what could not be put on board, and passed his note for the balance. Now, if he intended a fraud, or made the purchase with a view to the preference contended for, it is not to be presumed that he would have returned any part of the flour, but would have applied it to the purpose for which the purchase was made; and more particularly when the whole amount of the flour was not equal to the liabilities, which *Nicholson* and *Williams* had incurred on his account, and his not having done so, precludes the suspicion that he made the purchase with a view to an improper preference, and exempts the transaction from the imputation of collusion between him and *Nicholson* and *Williams*, for their benefit, at the time the flour was purchased. And the objection that the assignment of the bill of lading, and the deed to *Nicholson* and *Williams*, are void on the ground of undue preference, is not better supported. At common law, a debtor may secure one creditor, to the exclusion of others, either by payment, or assignment of his property. The bankrupt laws of *England* are not in force in this state, and there is no act of assembly, that can be so construed, as to defeat the operation of either the assignment or deed in question. The insolvent act of 1805 provides, "that if any person shall be convicted of giving to any creditor or security an undue and improper preference, he shall be deprived of the benefit of the act." What amounted to "an undue and improper preference" under that act, became a question; and the legislature, in 1807, passed a law, in which it is provided, "that a deed made by any person, in favour of one creditor or security, in contemplation of becoming an insolvent debtor, shall be taken to be an undue and improper preference, within the meaning of the act of 1805." But by neither of those laws is it declared, that a deed, assignment, or any other act of undue preference, is fraudulent or void, or inoperative to pass the property. *Wright* indeed, by the preference given to *Nicholson* and *Williams*, forfeited all claim to the benefit of the act of 1805, and if he had applied for relief under that act, it would have been denied him, by which denial the law would have been gratified; for though, as a punishment on a debtor for giving such undue preference, the law withholds from *him* its benefits, it does not operate to the prejudice of the preferred creditor; but the deed by which the preference is given, remains in full force, and vests in him the property intended to be transferred, if in other respects it is regular, which seems to be the case here. With respect to the bill of lading, it is an assignable instrument, and it is a common mode of transferring the cargo of a vessel. And the assignment in this case, made when the brig *Hunter* was at sea, proceeding on her voyage to *Martinique*, is clear of all exception; and *Nicholson* and *Williams*, having paid the amount of the debts, (as security against which the transfer was made,) before the money was received by

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Noland, from *Tuttle*, the property in the cargo became absolute in them.

It remains then to inquire, *Secondly*, whether, having a right to the property, they can in this form of action recover from *Owings* and *Cheston* such part of the proceeds as came to their hands? Of which it seems to me, there can now be but little doubt. Having a complete legal title to the property, they had an equal right to the proceeds. And a part of those proceeds having come to the hands of *Owings* and *Cheston*, without right, the law considers it as received for the use of those, who *ex equo et bono*, are entitled to it, and raises an implied promise to pay, on which an action for money had and received will properly lie. I think therefore that the *second* exception cannot be supported.

The *fifth* bill of exceptions presents this case in a different view, and the question is, how far the right of *Nicholson* and *Williams*, to recover in this action, as supported by the facts set out in the *first* and *second* bills of exceptions, is affected by the proceedings in the court of the first instance in the Island of *Martinique*. To which it is objected—1st. That *Nicholson* and *Williams* were not parties to those proceedings; and 2d. That if they were parties, those proceedings are not conclusive on their right to the matter in controversy.

It is a well established principle, governing the courts in *England*, that a judgment or sentence of a foreign municipal, or admiralty court, having competent jurisdiction, is conclusive in a case between the same parties, upon the same matter coming incidentally in question. The same principle has been adopted by the courts of *Pennsylvania*, and the Supreme Court of the *United States;* and for the same reasons governing them, I shall consider this court as bound by the same rule. In the case of *Sill vs. Worswick*, 1 *H. Blk.* 665, referred to in the argument, it is ruled, that if a *British* subject becomes a bankrupt, and another *British* subject, a creditor, recovers his debt by attachment against the property of the bankrupt, in a foreign country, after the bankruptcy, and returns to *England*, the assignees of the bankrupt may, in an action against him for money had and received, recover back the money so obtained. That case turned altogether upon the operation of the bankrupt laws of *England*. But in deciding that case Lord *Loughborough* expressly distinguished it from the case of a creditor not affected by the bankrupt laws, who recovers his debt by attachment in a foreign court, against the effects of the bankrupt; and says, that in such a case the creditor who has so obtained his debt, cannot, on going to *England*, be made liable to refund that debt. And he says further, that if in the case before him, the assignees had sent a person to *St. Christophers* to act for them, if notice of the assignment had been given to the court of *St. Christophers*, and that court had preferred the title of the creditor using the process of attachment to theirs, though he should think the determination wrong,

yet it could not be revoked in *England*. And the same principle is sustained in the case cited of *Rapalje vs. Emory*, in the Supreme Court of *Pennsylvania*, 2 *Dall. Rep.* 231, and in *Croudson and others, vs. Leonard*, in the Supreme Court of the *United States*, 4 *Cranch*, 434. We have seen in this case, that the cargo of the brig *Hunter*, which was consigned to *Silas Marean*, a merchant in *Martinique*, was transferred by *Wright* to *Nicholson* and *Williams*. On the arrival of the vessel at *Martinique*, *Benjamin Noland*, the agent of *Owings* and *Cheston*, and others, caused proceedings in their names to be instituted against the cargo, to recover the amount for which they sold the flour to *Wright*. The proceedings were *in rem*; and in the petition it is stated, "that *Wright*, having formed the project of a fraudulent bankruptcy, bought the flour, and a few days afterwards stopped payment and failed, after having made to certain persons, fictitious creditors, a fraudulent conveyance of his property." The consignee of *Wright* appeared to the proceedings, and after counsel being heard on both sides, a judgment of condemnation, on a view of the whole case, was passed—and a fraudulent conveyance to fictitious creditors being alleged in the petition, and made a part of the foundation of the proceedings, and *Nicholson & Williams* being the only persons to whom a conveyance had been made, it may perhaps be presumed, that the transfer to them was examined into by the court. I shall not examine how far those proceedings (being *in rem*,) affect the right of recovery in this case; they are in the cause. But if it should be admitted that they are not conclusive, *Nicholson* and *Williams*, not being named as parties, there were further proceedings in the same court, to which they were clearly parties. The day after the judgment of condemnation, and before it was executed, *Benjamin Nicholson*, the agent of *Nicholson* and *Williams*, caused proceedings to be instituted in their names, in relation to the same property, called a third opposition. The petition states, that the property was not *Wright's* but belonged to *Nicholson* and *Williams*, and sets out the deed from *Wright* to them. It reclaims the property, recites the judgment of the 11th of October 1810, alleges that it was obtained by misrepresentation, asks to be permitted to make opposition to the execution of it, and prays that it may be annulled by a new judgment. It alleges that the means of a third opposition is open to them, that they cannot too hastily put the court in a situation to pronounce on the subject of their claim, and prays to have all the parties to the first proceedings summoned to an immediate audience. The court recognized the third opposition, and ordered the parties to be summoned, to the end requested; and on the 16th of October 1810, a judgment was pronounced against the plaintiffs. But it is said that *Benjamin Nicholson* had no authority to bring suit, and that if he had, the proceedings instituted by him do not make *Nicholson* and *Williams* parties to the judgment of the 11th

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of October 1810, and on this the argument principally hinged—The letter from *Joseph H. Nicholson* of the 31st of August 1810, affords the only evidence of *Benjamin Nicholson's* authority. But that letter is very comprehensive. It is not in truth, an instrument *giving* the authority to *Benjamin Nicholson*, but a letter to *Silas Marean* the consignee of the ship and cargo, informing him of the mission of *Benjamin Nicholson*, and of the authority with which he was clothed. It is stated in that letter, that *Benjamin Nicholson* goes out with *full powers* to take possession of the brig *Hunter* and her cargo, and carries with him the deed of indenture from *Wright* to *Nicholson* and *Williams*. Now, if *Benjamin Nicholson* had *full powers* to take possession of the brig *Hunter* and her cargo, it would seem to follow, that he had power to take such possession in any manner that circumstances might render necessary, whether with or without legal process. And the circumstance that he took with him the deed of transfer from *Wright*, connected with the mention that is made of an agent having gone out, for the purpose of attaching the property for the use of *Owings* and *Cheston*, and others, goes a great way to show, that it was intended to arm him for legal controversy; and to enable him in a court of justice to resist, by that evidence of title in his employers, any proceedings that might be instituted against the property. For it was only in a court of justice that such evidence of title was necessary, as there was a postscript at the foot of the letter, by *Wright*, the consignor, to *Marean*, the consignee, directing him to conform to the instructions contained in that letter. Besides, *Marean* himself (in the language of the letter,) is requested to use *all exertions* for the interest of *Nicholson* and *Williams*, which is certainly an authority to assist *Benjamin Nicholson* in any measures he might find it necessary to adopt in order to get possession of the property. And if he had authority so to assist *Benjamin Nicholson*, it would seem to follow, by necessary implication, that *Benjamin Nicholson* had authority to pursue whatever steps might be necessary. Moreover, the petition was preferred and signed by an attorney of the court, and the authority of that attorney to do so recognised by the court; and the judgment itself, on the face of it, is stated to be between *J. H. Nicholson* and *N. F. Williams*, &c. of the one part, and the Messrs. *Ellicotts*, and *Owings* and *Cheston*, of the other part. Considering *Nicholson* and *Williams* then, both in form and substance, as parties, at least to the proceedings prosecuted in their names, and the judgment thereon, the question, whether they are thereby concluded, next presents itself, which does not seem to me to be very difficult of solution. I have before assumed it as a principle, that judgments of foreign courts of competent jurisdiction, are conclusive between the same parties, upon the same matter, when brought in collaterally as this is; they are evidence of their own correctness, and conclusive of

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the matter upon which they profess to decide, even though such decision be manifestly unjust; and if they state the evidence from which the conclusions are drawn, no other court can inquire whether such conclusions are right or otherwise. They may, to be sure, be looked into, not for the purpose of examining if the decision is right, but to see if the matter in controversy is decided. What then is this case? *Nicholson* & *Williams* submitted themselves to the authority and jurisdiction of the court of the first instance in the Island of *Martinique*, having jurisdiction over the matter. Their title to the thing in controversy in this case, was made the subject of judicial investigation, and upon a full hearing of the case, judgment was pronounced against them; not, as has been argued, a mere refusal by the court to revise or suspend the execution of its former sentence, but a solemn judgment against their title. And that is evidenced by the judgment itself, which sets out the grounds upon which it is founded. It adverts to the epoch of the purchase of the flour by *Wright*, and of his deed to *Nicholson* and *Williams;* to the circumstance that it was a deed of trust, and to the relationship subsisting between *Nicholson* and *Wright*, and draws the conclusion that the flour was held for the use of *Wright*—casts the plaintiffs from their reclamation, and condemns them to pay a fine of all the costs of suit. It is not very material whether by the process of the third opposition, *Nicholson* and *Williams* became parties to the proceedings that had before been instituted by *Owings* and *Cheston*, or not. It is enough that the proceedings by *Nicholson* and *Williams* were recognised and sanctioned by the court, as correct and regular, according to the laws and regulations under which the court professed to act; that their rights were investigated, and a judgment pronounced against them. It is said, to be sure, that nothing was adjudged in that case to *Owings* and *Cheston*. But what of that? Is it not the ordinary case of a judgment against a plaintiff in a question of right in our own courts, in which nothing is adjudged to the defendant but his costs, (as in this case)? And in a subsequent suit between the same parties, for the same thing, would not that judgment be just as conclusive against the plaintiff, as if he had been the defendant in the first suit, and judgment pronounced against him? I can see no difference between the cases, and it is impossible there can be any, if foreign judgments are put upon a footing with domestic. But suppose *Noland*, the agent of *Owings* and *Cheston*, had got possession of the cargo of the brig *Hunter*, without the judgment or authority of any court, and *Nicholson* and *Williams* had instituted proceedings to recover the property, and on a full hearing of the case, judgment had been pronounced against their right—could they afterwards recover in a suit for the same thing in one of our courts? And if they could not, will it be said that *Owings* and *Cheston* are placed in a worse situation, by having obtained possession of the proceeds of the flour un-

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der the authority of a judgment in their favour, than if they had got it without? I perceive no ground for such a distinction. The proceeding by *Nicholson*, the agent of *Nicholson* and *Williams*, in their names, called a third opposition, has been treated in argument as an appeal from the judgment of the court of the first instance; and if so, they clearly stand in no better predicament, than if it was an original proceeding. I think the judgment of the court in *Martin que* is conclusive, and that the court erred in giving a different opinion.

JUDGMENT AFFIRMED(a).

(a) See the act of December 1813, *ch.* 164, entitled, An act concerning Sentences of Foreign Courts.

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E and S, being entitled as tenants in common to a tract of land, and a ferry thereon, the latter then held by S alone, not claiming it exclusively, but receiving and holding the whole profits to discharge a debt alleged to be due to him from E, in order to enforce an agreement before then entered into between them, for a division of the land, and for an account of the profits of the ferry, and to suppress another ferry set up by S near the common ferry, E filed his bill in chancery against S —*Decreed*, that the agreement be enforced, &c. and that S account with E for one half of the profits of the ferry from the time he took, and so long as he had retained the whole profits; and also that he account relative to all debts existing between them. An account being stated, charging profits to the 12th of April 1799, with interest to 31st of January 1800—*Decreed*, that S pay to E £776 15 6, with interest from the 31st of January 1800; that the parties respectively convey to each other a certain moiety of the tract of land, &c.

APPEAL from a decree of the Court of Chancery. To comprehend this case it is necessary to state the former proceedings between the same parties, they constituting a part of this case. On the 11th of May 1796, the *first* bill was filed by *E. Norwood*, (the appellee,) against *S. Norwood*, (the appellant;) the object of which is fully stated in the decree by the chancellor. It was to obtain a decree enforcing an agreement entered into between the parties, on the 12th of November 1785, for a division of a tract of land called *United Friendship*, devised to them by their father; and for an account of the profits of the ferry over *Patapsco* river, then held by the defendant alone, and who at that time had taken exclusive possession, not claiming it exclusively, but holding the whole profits to discharge a debt alleged to be due to him from the complainant, &c. After the coming in of the defendant's answer, and the taking of testimony by the parties, the cause was set down for hearing, and argued by counsel.

HANSON, Chancellor, (December term 1798.) The complainant had three objects proposed by the bill—1. To have an agreement for the division of the land enforced. 2. To have an account of the profits of a ferry supposed to be on the land in the bill mentioned, conformably to the said agreement, and to be secured in the receipt of one half thereof in future. And 3. To have the suppression of another ferry set up near the said common ferry by the defendant. It seems that the defendant considered it of importance to prove that the ferry-house, &c. are not (as was supposed at the time of the agreement,) on the tract of land which was to be divided. He therefore obtained an order for laying down the lands for illustration. But if the chancellor conceived it of consequence to have the precise running of the land ascertained, he certainly could not, without violating the well known established principles of this court,

undertake to decide on the location, but would refer it to a jury. He cannot, therefore, otherwise than regret that the parties have incurred an unnecessary expense. It appears that they were in possession of the ferry landing, &c. as part of the tract of land devised to them by their father; that they agreed upon a division of the land as possessed, and that they have since held according to that agreement. This court cannot then do otherwise than say, that the agreement shall be enforced, and that the complainant is entitled to an account of the profits of the ferry, as prayed by the bill.

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according to the agreement; and that S permit E to receive weekly one half of the profits of the ferry, and that he suppress the ferry by him set up, &c. On an appeal this decree was in November 1802, *reversed* in part, & decreed that S be allowed for one half of the improvements erected on the land, and for the difference in value of the soil between the respective parts of the land. E, in June 1800, filed a *second* bill against S, claiming the profits of the ferry from the 12th of April 1799, and *referred* to the proceedings in chancery on his former bill, as having established his right to a moiety of the profits——*Decreed*, on the 2d of June 1802, that S should pay to E, £1427 11 6 with interest, &c. On an appeal, this decree was, in June 1804, *reversed*, there being no evidence to support the decree, the proceedings referred to not having been exhibited, and decreed that the chancellor dismiss the bill, without prejudice to the equity of E, if any he had. On the 7th of December 1803, E filed a *third* bill against S, stating the decrees that had then passed establishing his mutual right to the ferry, and claimed an account of the increased profits. An account of the profits was taken by the auditor from the 12th of June 1799 to the 30th of June 1804, amounting to £3485 2 3, including interest to the 12th of April 1806. On the 31st of July 1804, E obtained possession of the ferry, and afterwards received the whole profits S, on the 10th of December, 1807,

As to the third object of the bill, viz. To have a suppression of the ferry, which is alleged to have been set up by the defendant contrary to the spirit of the agreement, and the rights of the complainant, there are not, perhaps, sufficient circumstances thereto relative, brought before the court, to enable the chancellor to decide. But supposing the case to be as he conjectures, there is no decision that he knows of in the books, or in the records of this court, which can be brought exactly in point. He conceives, however, that the question may be decided by common sense, without the aid of learning and authority. If two persons agree to set up, at their joint expense, a ferry, for the accommodation of travellers, on a certain road, and the ferry is accordingly set up, and then one of them set up another ferry for his own emolument, at the distance of 20, 30, 50, or 100 yards, from the old ferry, to accommodate the same set of travellers, who is there that will not conceive the act to be in direct violation of the rights and interests of his partner? But if the new ferry be only at a small distance, and yet is only for the accommodation of travellers on another road, who would not otherwise cross at the old ferry, it cannot be supposed that the partner is entitled to have it suppressed.

Now, whether the new ferry in the present case be of the latter or former kind, does not, as has been intimated, clearly appear.

It is impossible for the chancellor to proceed immediately to a final decree, and therefore the last question may remain for further consideration, and perhaps further preparation relative thereto may yet be made—*Decreed*. that the defendant account with the complainant for one half of the profits of the ferry in the bill and answer mentioned, from the time the defendant took, and so long as he has retained the whole profits thereof; that the said parties shall further account with each other relative to all debts whatever arising on the agreement aforesaid, or otherwise. That the auditor of this court state the account or accounts, &c.

Various reports were made by the auditor, under this decree of the chancellor, to which there were sundry exceptions by the parties, and the chancellor's decision thereon, and instructions to the auditor. The auditor stated an account pursuant to the chancellor's directions, in which

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the defendant was charged with the profits of the said ferry from the 6th of September 1795, to the 23d of June 1796, when he erected a new ferry; the profits of both ferries were then charged to the 12th of April 1799, which, with interest thereon to the 31st of January 1800, left then a balance due from the defendant to the complainant of £776 15 6.

claimed to have the amount of profits received by E deducted from the amount stated to be due by the auditor. He also objected to the including in that account the profits comprehended in the reversed decree, which reversal he had relied on in his answer as a bar &c also to all profits charged three years prior to the filing the bill. The auditor's report was confirmed, and *decreed*, that S pay to E £3485 2 3, with interest from the 12th of April 1806. From this decree S appealed On the 29th of December 1807, S filed a bill against E claiming the profits of the ferry from the 31st of July 1804 to be allowed by way of discount out of the amount of the last mentioned decree, and for an injunction to suspend all proceedings on that decree—— which injunction was granted; and on motion of E to dissolve the injunction, an account was ordered to be stated, so as allow to S, by way of discount, the amount of a judgment obtained at law by R D, for the use of S, against E; and on the account being so stated—— *Decreed*, that the injunction be dissolved, provided that E should not execute at that time for more than £2380 5 2; and an injunction was ordered suspending execution on the above mentioned judgment at law until further order On the bill by S against E, the amount of the decree obtained by E against S, for £3405 2 3, being deducted from the amount due to S, for profits from July 1804 to June 1810, and the amount of the judg-

Hanson, Chancellor, (February term 1800)—*Decreed*, that the last stated account and report of the auditor be approved, ratified and confirmed; and that the defendant pay to the complainant the sum of £776 15 6, with interest from the 31st of January 1800, until payment. Also decreed, that the agreement stated in the bill for dividing the land called *United Friendship*, shall be carried into effect, and that accordingly the defendant, by a good deed, &c. shall give, grant, &c. to the complainant, and his heirs, all that part of the said tract of land called *United Friendship*, which has long been, and now is, in the complainant's possession, as stated in the bill, and admitted in the answer under the agreement aforesaid; and the complainant in like manner shall convey to the defendant, and his heirs, all the other part of the said land called *United Friendship*, now in possession of the defendant, as stated in the bill and admitted in the answer; and the intent of this decree, conformably to the agreement of the parties, is that the branch from, &c. shall be the division line, &c. *Decreed* also, that the defendant be enjoined to permit the complainant to take and to pay the complainant weekly one half of the profits arising from any ferry by the defendant, carried on at the place where the ferry mentioned in the bill was kept, or so near the place as to take the custom which would otherwise go to any ferry kept at the said place. And that the defendant be further enjoined not to disturb, molest or interrupt the complainant, in the enjoyment of one half of the profits of such ferry, or in carrying on a ferry at the said place, in case the complainant shall think proper to provide for carrying on the same, on the defendant's refusing or neglecting to carry the same on jointly with the complainant, or singly, allowing the complainant one half of the profits. And that the defendant be further enjoined, not to change or stop or obstruct the passage of any road on either side of the river leading to the said ferry, without the consent of the complainant; but that all access, as heretofore, shall be allowed by the defendant to every person, carriage, horse, or other animal or thing, coming to the said ferry, or which would come to it in case there was no obstruction. And in case the defendant shall refuse, neglect or delay, to carry on a ferry with the complainant at the place where the ferry aforesaid first mentioned in the bill was carried on, and the complainant shall think proper to carry on the same for their joint benefit, he, the defendant, is hereby enjoined not to carry on, without the complainant's consent, any ferry which shall inter-

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fere with, or take custom from, the ferry carried on at the said place. And in case the complainant, on the defendant's refusal, neglecting or delaying as aforesaid, shall actually set up and carry on a ferry at the place aforesaid, he shall pay weekly to the defendant one half of the profits thereof, after deducting the expenses incurred in so setting up and carrying on the ferry. *Decreed* also, that the defendant pay to the complainant the costs by him expended. &c. From this decree the defendant appealed to the late court of appeals.

At November term 1802, that Court, [*Jones*, *Mackall*, *Potts* and *Dennis*, J.] *Decreed*, that such part of the decree complained of, for ratifying and confirming the last stated account and report of the auditor, whereby the defendant was adjudged and decreed to pay to the complainant the sum of £776 15 6, with interest from the 31st of January 1800, until the time of payment, be reversed. *Decreed* also, that the complainant account with the defendant for the sum of £537 12 7, being the amount of the one half of the improvements erected on the said tract of land called *United Friendship*, at the time of the division thereof between the said parties; and that the defendant account with the complainant for the sum of £400, being the amount of the difference of soil, between the respective parts of the said tract of land, and that the said two sums of £537 12 7, and £400, bear interest from the 12th of November 1785. And that the auditor, in restating the said account, shall also charge the defendant with a moiety of the profits of the said ferry, agreeably to his said last stated account and report, with interest thereon, to be computed from the periods stated in the said account. And that the auditor, in stating such account, and ascertaining the profits of the new ferry set up by the defendant, shall ascertain the reasonable expense of setting up and establishing the same, as well as afterwards keeping the ferry, and shall charge the complainant with one half part of the said expenses. *Decreed* also, that all and every part of the said decree respecting the agreement stated in the said bill for dividing the land called *United Friendship*, between the parties, and carrying the same into full effect, and all and every part of the said decree respecting the ferry; and the complainant being entitled to hold one half part of the same, and to have and receive one moiety of the net profits thereof, as tenant in common with the defendant, conformably to the limitations and conditions contained in the said decree, be affirmed. *Decreed* also, that the chancellor pass such decree and order as shall be necessary to have the account stated in the manner herein directed, and on return thereof, that he pass a decree for the payment of principal and interest due the complainant; and that in the mean time he pass such further order and decree as may be necessary for carrying into effect those parts of the said decree, affirmed by this court. *Decreed* also, that the decree of the chancellor respecting the payment of costs by the defendant, be revers-

ment of R D for h use against E— *Decreed*, that E pay to S £211 12 3, with interest, &c. From this decree E appealed. On the appeal by S the decree was *affirmed* with costs; and also decreed, that E be perpetually enjoined from taking out execution on that decree, except for the costs on the appeal, and that S be perpetually enjoined from taking out execution on the judgment at law above referred to, the amounts of the decree and judgment being settled in the case of S against E; and in that case on the appeal by E, the decree was *affirmed*, with costs.

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ed, and hat each party pay his own costs in the court of chancery, and in this court.

The *second* bill was also filed by *E. Norwood* against *S. Norwood*, on the 25th of June 1800. It stated the former bill and proceedings—that the complainant and defendant were seized in fee, as tenants in common, and that the former decree included an account of the profits only until the 12th of April 1799, "*as by proceedings on record in the high court of chancery will appear.*" The bill also stated, that the ferry, and the profits thereof, were increasing daily from the great and multiplied resort of custom. In this case neither the title papers were filed to prove the equal rights of the parties to the ferry, as in the first bill, nor was the decree passed in the first cause, or any part of the proceedings in the same made a part of this case, except by the reference above stated. The defendant's answer, filed on the 16th of February 1801, admitted they were seized in fee of *United Friendship*, and that the defendant had believed the ferry was on the same; but having discovered that not to be the case, then claimed the ferry as his exclusive property, and denied the complainant's right to the profits.

On the 2d of November 1801, there was a decree for an account, and on the 12th of December 1801, the auditor reported that there was due to the complainant, for his part of the profits from the 12th of April 1799 to the date of the report, including interest, the sum of £1445 2 4. There were several exceptions made to the report by the defendant, which were decided on by the chancellor, and a new report directed, which was made on the 13th of April 1802, making the sum due to the complainant £1427 11 6, to which there was also exceptions, but they were overruled; and a final decree was passed on the 2d of June 1802, that the defendant should pay to the complainant the sum of £1427 11 6. From this decree there was an appeal to the court of appeals; and at June term 1804, that court reversed the decree of the chancellor, on the ground that there was not sufficient evidence contained in the record to support the chancellor's decree—the original decree referred to in the bill not being exhibited, and making no part of the evidence in the court below. The chancellor was directed to dismiss the bill without prejudice to the equity of the complainant, if any, and without costs. See 1 *Harr. & Johns.* 525.

The *third* bill, (the one now before the court on the defendant's appeal) was also filed by *E. Norwood* against *S. Norwood*, on the 7th of December 1803. The bill stated the decrees that had passed between the parties establishing the mutual right of the complainant to the ferry, and claimed an account of the increased profits, and that the same proceedings, when filed, might be part of the cause. The defendant's answer admitted the decrees establishing the rights of the complainant to the portion of profits. It then set up an exclusive right to the ferry. It

also set forth the former decree of the chancellor, comprehending the profits from the 12th of April 1799, to the 12th of December 1801, and stated the reversal of that decree, and relied on the reversal as a bar to any profits within that period. In consequence of the reversal of the decree by the court of appeals, the complainant filed, as exhibits in support of the third bill, all the proceedings on the two first. On the 12th of December 1805, a decree passed by consent for an account, reserving all equity, and especially that part of the claim for profits which was included in a former decree reversed. The auditor, to ascertain the profits, made an average from the 12th of April 1799 to the 12th of April 1802, that is, for three years, from an account kept of persons and things passing over the ferry for 55 days, making the amount each day £2 12 1½ and each night £0 9 8, amounting together to £3 1 9½. And from the 12th of April 1802 to the 30th of July 1804, the average was made from accounts kept by the complainant's witnesses—each day £2 16 7¾, and each night £0 7 6, making together £3 4 1¾. The auditor reported on the 12th of April 1806, that there was due to the complainant from the defendant, £3485 2 3, including profits to the 30th of July 1804, and interest to the 12th of April 1806. On the 31st of July 1804, the complainant obtained the possession of the ferry, and since then held the possession, and received the whole profits. In order to obtain a deduction from the amount due to him by the auditor's statement, the defendant petitioned the chancellor to have them deducted. On the 10th of December 1807, the chancellor passed an order confirming the report of the auditor of the 12th of April 1806, unless exceptions were filed. On the 15th of December 1807, the defendant excepted to the report,—1. Because the account included the profits comprehended in the reversed decree. 2. To all the profits charged three years prior to the filing of the bill. 3. Because interest is charged in the account to the 13th of April 1806, when long before that time the complainant had possession of the ferry. 4. Because he is not credited with his portion of the profits of the ferry since it had been in the possession of the complainant, during which time the complainant received those profits. 5. Because the accounts are founded on the complainant's evidence, rejecting the evidence on the part of the defendant, and which was equally entitled to credit. On the 28th of December 1807, all the exceptions were overruled, and the report of the auditor of the 12th of April 1806, was confirmed by the chancellor, who decreed that the defendant pay to the complainant £3485 2 3, with interest thereon from the 12th of April 1806, until paid, and costs. From this decree the defendant, on the 27th of July 1808, appealed to this court.

The cause was argued at December term 1812, before Chase, Ch. J. and Buchanan, and Earle, J.

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T. Buchanan and *Magruder*, for the Appellant, contended—1. That as the decree of the chancellor, on a former appeal between the parties, was reversed, the subject matter of that decree could not again be brought into view, and ought not to have formed any part of the decree now before this court, notwithstanding the reservation of the complainant's equity, in the decree of reversal, because the chancellor's decree was reversed upon the ground that the evidence, upon which it was founded, was insufficient. A bill may be dismissed without prejudice, and to have the effect of a *non pros* at law. 3 *Blk. Com.* 451. And so it may be dismissed, and yet equity be reserved, if it is not stated to be without prejudice But a reversal on an appeal is different. The reversal here was on the merits, and not a dismissal. There was no evidence in the record to support the decree. The appellate court acted on it, and gave an opinion on the case, which put an end to the subject matter of the decree on any future bill. *Wortley vs. Birkhead*, 3 *Atk.* 809.

2. The complainant being in possession of the ferry in 1806, when the audit was returned, on the defendant's petition he ought to have been credited with his half of the amount of the profits which the complainant had received after he had obtained possession. Suppose the defendant had paid money to the complainant, would it not have been credited? And if so, is not the receipt of profits to be taken in the same light as a payment in money? It was a proper discount, and allowable as well in equity as at law. The audit is always open and under the control of the chancellor, until a final decree on it. The sum to be discounted could have been ascertained from the proof furnished by the complainant, whereon the audit was founded. The profits of the ferry were daily increasing, and if the complainant had accounted on his own proof, he would have been benefited. In *Clarke vs. Magruder*, 2 *Harr. & Johns.* 77, a discount was allowed, which arose after the suit was brought; and if such a discount was allowed at law, there is a stronger reason for its being allowed in equity. The reason the defendant did not insist on the discount sooner, may be accounted for by the proceedings which took place in the cause. Until it was known how the issue, which was sent to the county court for trial, would be found, it was unnecessary to claim the discount—that issue being for the purpose of ascertaining whether or not the ferry was on the tract of land called *United Friendship;* and if it had been found not to be on that land, the complainant's claim was at an end.

3. Part of the claim was barred by the act of limitations. The bill was filed on the 7th of December 1803, and all claim for profits prior to the 7th of December 1800, was barred by the act of limitations, which was relied on by the defendant, and if insisted on in chancery, it must be allowed. It cannot be said that the former bill, where the decree was reversed, will prevent limitations from operat-

ing. It cannot be right for the complainant to take advantage of his own negligence. This bill was filed, before the reversal of the former decree, in which profits were claimed that had accrued after the 1st of December 1801, but after the reversal, the complainant makes his bill to include all antecedent profits since the 12th of April 1799. To show that limitations will bar in a case like the present, they referred to 1 *Harr Chan. Pr.* 376. *Reade vs. Reade*, 5 *Ves.* 744; and *Hercy vs. Ballard*, 4 *Bro. C. Rep.* 468.

Key and *Shaaff*, for the Appellee, 1. Upon the effect of the reversal of the former decree by the court of appeals, and to show that it operated only as a *non pros* at law, they cited *Anon.* 1 *Chan. Cas.* 155; and *Shepherd vs. Titley*, 2 *Atk.* 354.

2. The auditor's accounts were closed and returned on the 12th of April 1806, including profits to the 30th of July 1804, and interest to the 12th of April 1806. An order for confirmation was obtained. Suppose afterwards an application had been made for new evidence, it would have been an appeal to the discretion of the chancellor, and he might or might not admit it. The petition of the defendant was unaccompanied with proof that the complainant had possession, and had received the profits. Nor does it state that he would be willing to take the average value of the profits as had been decreed to the complainant; but claims an account to be taken of the profits. If the chancellor had complied with the prayer in the petition, there would have been no end to the case so long as the complainant received any profits. The discount was not claimed in any definite form in which it could be allowed. It is evident the object was delay. The audit had been closed, and an order for confirmation had passed. In such a case there is no instance of opening the audit to admit new proof. The case was set down for hearing; and to open the case then for the purpose of taking additional proof, is discretionary with the chancellor, and no appeal lies from his admitting, or refusing to admit it. The audit brings the profits received by the defendant down to the 30th of July 1804, during the time he had possession. This closed the subject, and the defendant's petition to open the audit to admit his discount of profits received by the complainant after the 30th of July 1804, without exhibiting any proof that they had been received by him, would lead to endless litigation.

3. The act of limitations may be resisted on two grounds —1st. It does not attach in any case in the nature of a trust. The defendant is considered as a receiver or trustee of the complainant. It had been decreed that they were tenants in common of the ferry; and the defendant had received one half of the profits for the benefit of his co-tenant, the complainant. In such a case 50 years would not have barred the claim of the complainant. The act of the defendant was the act of the complainant, and the act

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of limitations could never attach. *Lloyd vs. Gordon*, 2 *Harr. & M Hen.* 254. 2d. A bill had been filed by the complainant, and a decree passed in his favour, but which, on an appeal, was reversed. This was not the fault of the complainant, it was the fault of the chancellor, who erred in deciding the case. The decree having been reversed, he had a right, under the statute 21 *Jac.* I, *ch.* 16, to bring a new bill within one year after the reversal. Here the bill was filed before the reversal; and the statute relates as well to a case decided on its merits, as to any other. In *Schnertzell vs. Chapline*, 3 *Harr. & M Hen.* 439, the judgment was arrested because the damages laid in the declaration was not within the jurisdiction of the court, and a new action was brought, and the plaintiff recovered.

Curia adv. vult.

On the 29th of December 1807, *S. Norwood* filed his bill against *E. Norwood*, claiming the profits of the ferry from the 31st of July 1804, the time when the latter obtained the possession of the ferry, and praying for an account, &c. and the payment of his proportion, or a discount from the decree obtained against him by *E. Norwood* in December 1807, and also for an injunction suspending all proceedings on that decree. The chancellor, by his order of the 19th of January 1808, granted an injunction to suspend all proceedings on the decree until the further order of the court. At February term 1808, *E. Norwood* petitioned the chancellor for a dissolution of the injunction; and the chancellor, considering that he was entitled to a dissolution, after deducting what appeared from the testimony before the court to be due to *S. Norwood*, directed the auditor to state an account in a particular manner for the information of the court; which being done, the chancellor passed an order at July term 1808, dissolving the injunction, provided that *E. Norwood* should not be at liberty to execute at that time for more than the sum of £2380 5 2. And the amount of the judgment by *R. Dulany*, executrix of *D. Dulany*, for the use of *S. Norwood*, against *E. Norwood*, for £318 12 5, with interest and costs, having been deducted, an injunction was ordered suspending execution on that judgment until further order. At February term 1809, the chancellor passed a decree to account. After many reports and accounts having been returned, and various exceptions, &c. the chancellor, by his final decree passed at December term 1811, decreed that *E. Norwood* should pay to *S. Norwood* the sum of £211 12 3, with interest thereon from the 1st of December 1811, until paid, and costs. This decree was founded upon the auditor's account, in which *E. Norwood* was charged with one half of the amount of profits received from the ferry from the 31st of July 1804, to the 24th of June 1810; also with the amount of the judgment and costs obtained by *R. Dulany*, executrix of *D. Dulany*, and in which he was credited with the amount of the decree

by him obtained against *S. Norwood*, in December 1807. From this decree *E. Norwood* appealed to this court.

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As this last appeal was depending when the argument was had on the other appeal, the court delayed deciding on the latter until hearing an argument on the former. The former appeal was argued at the present term before CHASE, Ch. J. and BUCHANAN, NICHOLSON, and MARTIN, J. by

Shaaff for the Appellant, *(E. Norwood,)* and by *Harper* and *Magruder*, for the Appellee, *(S. Norwood.)*

THE COURT, on the first appeal, *decreed*, that the decree of the court of chancery be affirmed, with costs. *Decreed* also, that *E. Norwood*, the appellee, be perpetually enjoined from taking out execution, or proceeding on the decree of the court of chancery, hereby affirmed, for the sum of £3485 2 3, with interest and costs, except as to the costs adjudged by this court to the appellee on this appeal; and that the appellant, *S. Norwood*, be perpetually enjoined from taking out execution, or proceeding on the judgment by the executrix of *D. Dulany* against *E. Norwood* for the sum of £318 12 5, with interest and costs, referred to in the proceedings in this case; the said sums of £3485 2 3, and £318 12 5, having been embraced and settled between the parties in a subsequent decree of the chancellor between them, which last decree has been affirmed by this court during the present term.

THE COURT, on the second or last appeal, *affirmed* the decree of the court of chancery, (for £211 12 3, with interest from the 1st of December 1811, until paid, and costs,) with costs.

DECREES AFFIRMED, &c.

GRANTZ & FRALICK vs. THE STATE use of CRIST, *et ux.* DECEMBER.

APPEAL from *Frederick* County Court. The record states an affidavit made on the 23d of December 1811, by *Crist* and wife, before a justice of the peace, that the wife of *Crist*, before their marriage, had an illegitimate child by *Grantz*, which child had been supported by the mother, *(Crist's* wife,) from the 9th of March 1807, to the 14th of

Where under the act of 1796, ch 34, directing the proceedings against persons guilty of fornication, the record stated the affidavit of the mother of an illegitimate child, the order on the father of the child to pay for the support of the child for four years, &c. proof of demand, refusal, and a *scire facias*, (on a recognizance previously entered into by the father in the sum of £30, conditioned to indemnify the county, &c.) stating that the county had not been indemnified, &c. The defendant pleaded—1. That the child was, at its birth, committed to the custody of H B, and so remained. 2. That the mother never had the custody of the child. 3 A submission to arbitration, an award, and offer of compliance, which was refused. 4. That the sum of £30 a year was more than adequate for the maintenance of the child. 5. That the county had not been damnified Issues to the 1st and 2d pleas, and general demurrers to the others, which demurrers the county court ruled good, and verdicts on the issues in fact for the plaintiff, and damages assessed to £120, and execution awarded for £30 debt and costs, which were taxed part in money and part in tobacco, with a memorandum that the judgment was to be released on payment of 120 dollars, and costs—On appeal, judgment *reversed*

Quere. Whether or not a judgment for costs taxed in tobacco since the act of 1806, ch. 41, s. 5, is not erroneous?

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March 1809, (when she married *Crist,)* and by *Crist* and wife from the 14th of March 1809 to the 9th of March 1811, at which time the child was at the age of four years. Order by the justice on the father, *(Grantz,)* to pay *Crist* and wife $30 annually from the 9th of March 1807, as an adequate compensation for the maintenance of the said illegitimate child for every year until the child should arrive to the age of seven years. Demand and refusal being proved, a *scire facias* issued on the 6th of January 1812, on a recognizance entered into by the defendants in *Frederick* county court, on the first Monday in February 1811, for the sum of $30 current money, conditioned that *Grantz* should indemnify the county from any charges that might accrue from the maintenance of a male illegitimate child, begotten by the said *Grantz* on the body of a certain *Christena Linebaugh*. &c. The *scire facias* stated that *Grantz* hath not indemnified the county of *Frederick* from any charges, &c. but assigns no sum or breach in which the county was damnified. The sheriff was commanded to make known to the defendants that they show cause why the said sum of $30 ought not to be levied of their bodies, goods, &c. The defendants pleaded five pleas—1. That the illegitimate child was at its birth committed to the custody of *Henry Bowse*, in whose custody it remained from the 9th of March 1807, continually, until the 9th of March 1811. 2. That the said *Christena* had not had the custody of the said child from the 9th of March 1807, until the 14th of March 1809; and that the said *Crist* and wife have not had the custody of the child from the 14th of March 1809 until the 9th of March 1811. 3. That *Crist* and wife ought not to have execution, because the illegitimate child mentioned in the said recognizance and order, was born on the 9th of March 1807, long after the birth of the illegitimate child mentioned in the recognizance on which the *scire facias* issued; and after the intermarriage of the said *Crist* with the said *Christena*, to wit, on the 2d of January 1811, *Crist* and wife, and *Grantz*, submitted to an award, &c. Award was made that *Grantz* should pay *Crist* and wife $80 on, &c. and for the payment of which he should give his bond. Bond tendered according to the award, which was refused by *Crist* and wife. That *Frederick* county, from the birth of the said child, hath in no wise been damnified or put to any charge or expense for the maintenance of the said illegitimate child, &c. 4. That *Crist* and wife ought not to have execution for the sum of $30 a year for four years—because $30 p. year, until the child arrived at the age of seven years, mentioned in the order, was more than adequate for the maintenance of the said *child*, until the said child should arrive at the age of seven years. 5. That *Frederick* county hath in no wise been damnified or put to any charge or expense by reason of or for the maintenance of the said illegitimate child. There were the general replications and issues joined to the first and second pleas, and general demurrers to the

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3d, 4th and 5th pleas. The county court ruled the demurrers good. There were verdicts on the issues to the 1st and 2d pleas for the plaintiff, and damages assessed to $120. Execution awarded for $30 ct. mo. debt, and $11 60 and 797 w. *tobacco* costs. *Memorandum.* The plaintiff agrees to release the debt for which judgment is entered, on payment of $120, assessed by the jury, and costs. From this judgment the defendants appealed to this court.

Taney, for the Appellant. This is a proceeding under the act of assembly of 1796, *ch* 34 The recognizance was entered into in February 1811. The order of the magistrate requires *Grantz* to pay $30 a year from the 9th of March 1807, to the 9th of March 1811. It appears by the affidavit and order, that the mother of the child was married to *Jacob Crist* on the 14th of March 1809. Among other pleas, the defendants pleaded a submission by bond after the birth of the child, to stand to the award of the persons therein named; an award by them, and an offer on his part to perform. This submission was before the recognizance. If the act of assembly is considered to be for the benefit of the mother, and to enable her to support the child, then her husband, who was entitled to receive the money, might submit the claim to arbitration, and by the bond, award, &c. would be barred of his *scire facias.* The defendants also pleaded, that the county was not damnified. If the nonpayment of the money is, under the act of assembly, a breach of the recognizance, then this plea was good, and the plaintiff, instead of demurring, ought to have replied, setting out the order of the magistrate, the demand and refusal to pay, and there could be no breach of the recognizance before it was given. The mother maintained the child until her marriage, afterwards the maintenance was that of her husband, in suing for which the wife ought not to have joined. The judgment is given for the debt in the recognizance, with costs *taxed in tobacco.* By the act of 1806, *ch.* 41, *s.* 5. all taxations of costs must be in *dollars and cents.*

Pigman, for the Appellee. The demurrer to the 3d plea, and judgment of the court below, upon the demurrer, ought to be supported, because *Crist* and wife could not submit the matter in controversy to any arbitration. The act of 1781, *ch.* 13, the act of 1785, *ch.* 47 and the act of 1796, *ch.* 34, must all be taken together, and construed as if they were but one law, the two last being supplements to the first. The recognizance was given for the benefit of the state, to prevent bastards from being a burthen to the state, and to provide a competent support for them. By the acts of assembly above referred to, the county of *Frederick* was damnified, and received an injury from the time the child was born. In the order of the justice of the peace, set out in the record, it will be seen that *Christena Crist*, the wife of *Jacob Crist*,

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had the care of the child from the 9th of March 1807, the day of its birth, for the order states, that on the 9th of March 1811, "it was of the age of four years." Mrs. *Crist* had it from the 9th of March 1807 to the 14th of March 1809, and *Crist* and his wife had it from the 14th of March 1809 to the 9th of March 1811. The 3d plea also sets out, that the agreement to refer was made on the "2d of January 1811," so that by the defendant's own showing, from the 9th of March 1807, the birth of the child, to the 2d of January 1811, almost four years, no sort of provision was made by *Grantz* for its support. These acts of assembly have not left it in the power of the parents of bastards to say what shall or shall not be sufficient for their maintenance. If they had, these children would sometimes be provided for, and sometimes not; and the very evil these acts were made to prevent, would still exist. Formerly these wretched children were half naked and half starved, from the neglect of parents, who were ashamed to own them, or they were thrown upon the generosity of the public for charity, and became a nuisance to society; and this would be the case again, if fathers were permitted to delay their support as long as they pleased, or to fix for them, without affection and love, what they would judge to be enough at a protracted period. The act of 1796, *ch.* 34, lays the ground work of this *scire facias*. It says, upon the application of the mother, or other person, who has the care of the child, verified by oath or affirmation, that no money has been received from the father, or securities, for the use or maintenance of said child, a justice of the peace shall issue an order upon the father, &c. to pay such sum of money annually, not exceeding $30, as the said justice shall direct, and upon service of the order, and affidavit of the service, and that the money was not paid, the clerk is authorised to issue the *scire facias*. By turning to the order of the justice of the peace in the record, it will be seen all this has been done, and nothing more is required to entitle the state to the *scire facias* for the use of the mother, or other person, who has the care of the child. The father, to be sure, may appear to the *scire facias*, and prove, if he is able, that he has maintained the child, and taken due care of it; but he cannot, according to the good sense and policy of the laws, defend himself by showing there was an arbitration about it; nor can he say the county has not been damnified as long as he has made no provision for the child, because the very birth of the child, and no provision being made for it, is an injury to the county. The oath before the justice, and justices' order, entitles *Crist* and wife to receive the money; there could not be two orders, one for *Crist* and wife, and one for Mrs. *Crist* in her own name, her marriage prevented her from having an order for her separate use. There is a demurrer to the fourth plea, which was not considered in the court below sufficient, and ought not to receive a replication. The plea

states, that $30 per annum, allowed by the justice of the peace in the order, is more than adequate for the maintenance of the said child until it shall arrive to the age of seven years. The act of 1796, *ch.* 34, gives the justice of the peace a right to allow any annual sum, not exceeding $30, of course no tribunal could legally alter the sum fixed by the justice of the peace, as long as he is within the limits of $30. The fifth plea to which a demurrer was entered, is also insufficient in law. It states that *Frederick* county hath not been damnified. The act of 1796, *ch.* 34, is the true source of authority for this *scire facias*, and authorises it to issue upon the order contained in the record. It does not require any greater injury than the want of provision for the child, and this want of provision is to be made known by the mother, or the person or persons having the care of the child, on oath, then the order issues, and upon the service of it, and oath that it was served, and the money therein mentioned was not paid, the clerk is authorised to issue the *scire facias*; under this act of assembly the county is then considered damnified. It is contended that the judgment of the court, after the verdict was given by the jury, is proper and good. This *scire facias* is not like one to revive a judgment out of date, or against executors, or on recognizances, issued at common law. By the act of 1796, *ch.* 34, the court have a right to decide on these recognizances, without any imparlance or delay, and to bring the matter fairly to trial in a short summary way; and of course, as much strictness in the proceedings is not required as upon our common writ of *scire facias*. The jury in this case assessed the damages to $120, and although damages could not be given on a *scire facias* to revive a judgment in the general for delay of execution, yet in the summary proceeding authorised by the act of 1796, *ch.* 34, it must necessarily often be required. The justice of the peace is authorised to allow as high as $30 per annum for seven years, and where three or four years becomes due, and an order issue, the damages must exceed the sum of the recognizance; but though the verdict of the jury is for $120, the judgment of the court is for the penalty in the recognizance, and costs, as may be seen by referring to the judgment, with a memorandum that the plaintiff released the debt upon the payment of $120 by the jury assessed. As this is a proceeding entirely depending upon the acts of assembly, it is not meant to urge any practice in *England*, or our own courts, upon the common writ of *scire facias*. Under our acts of assembly it is more a summary proceeding than any thing else, and these acts do not confine the courts to any particular mode of giving verdicts or judgments, but make it their duty to decide upon the "*matter fairly, without any imparlance or delay.*" By turning to the order of the justice of the peace, it will appear the oath was made on the 23d of December 1811, the same day the order was served. In the third plea it is stated, the parties left the matter to arbi-

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tration on the 2d of January 1811, long before any order passed, and the *scire facias* did not issue until the 6th of January 1812, almost one year after the submission mentioned by the defendants in the third plea; no provision being made for the support of the child. In the court of King's Bench, on an appeal, supposing error in a judgment giving on a *scire facias*, because the jury gave damages, the judgment was supported, because it had been given on the merits. In the case of *Knox vs. Costello*, 3 *Burr.* 1791, Mr. Justice *Wilmot*, (after stating the case particularly,) said "the court ought to support a judgment recovered upon the merits."

JUDGMENT REVERSED.

DECEMBER.

HARWOOD vs. RAWLINGS's Heirs.

B H filed a bill in chancery in 1805 against the heirs at law of R R, on a bond executed by R R in 1789, the personal estate being insufficient. The heirs, by their answer, relied on the act of limitations, and to prevent the operation of that act, B H exhibited a judgment obtained by him in 1802, on the administration bond executed by the administratrix of R R.—*Decreed* that the bill be dismissed.

APPEAL from the Court of Chancery. The bill of the complainant, (now appellant,) filed on the 17th of April 1805, stated that *R. Rawlings*, deceased, the father of the defendants, (the appellees,) gave his bond, dated the 5th of May 1789, to *T. Harwood*, deceased, and the complainant, for £137 18 0; that a payment of £57 10 3 was made on the 8th of April 1794, by *S. Rawlings* the administratrix of the obligor. The bill also stated the insufficiency of the personal assets belonging to the obligor's estate, and his having two heirs, the defendants, to whom his real estate descended. *Prayer*, that the said real estate be sold to pay the above bond. The answer of *R. G. Rawlings*, one of the defendants, filed at May term 1805, declared his ignorance of the bond, and relied on the act of limitations. At July term 1808, the complainant filed another bill, reciting the matters in the former bill, and stating that the real estate of the obligor had been sold by an order of *Anne-Arundel* county court, under the act to direct descents, and praying an injunction to prevent the commissioners, appointed to make the sale, and the purchaser, from paying over the money to the heirs; which injunction was granted. The answer of *F. Rawlings*, the other defendant, by his guardian, was filed at May term 1809, stating his ignorance of the bond, and put the complainant on the proof of it. The second answer of *R. G. Rawlings* was filed at February term 1811. He admitted the sale of the real estate of his father by an order of *Anne-Arundel* county court, and the want of personal assets out of which the complainant's debt could be satisfied. He neither admitted nor denied the justice of the claim. He admitted the other allegations in the bill. A commission issued, under which the execution of the bond was proved. At February term 1812, *F. Rawlings*, having arrived of age, filed his petition to have leave to plead, answer or demur, which was granted, and he answered—declaring his ignorance of the bond, and pleading the act of limitations. The com-

plainant exhibited a judgment obtained in *Anne-Arundel* county court at April term 1802, in an action on the administration bond, given on the 21st of April 1791, on the estate of *R. Rawlings*, brought in the name of the state, at the instance and for the use of *T.* & *B. Harwood*, against *T. N. Stockett*, one of the sureties in that bond. The judgment was confessed for the penalty of the bond, and costs, "to be released on payment of what *James Mackubin* shall award to be due."

KILTY, Chancellor, (February term 1813.) The defence set up of the claim being barred by the act of limitations, is one which the chancellor would not be disposed to countenance, if he had a discretionary power. But as it is relied on, he considers himself bound to say, that it is a bar to the relief prayed.—*Decreed*, that the bill be dismissed, but without costs. From which decree the complainant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, NICHOLSON, JOHNSON, and MARTIN, J.

Magruder, for the Appellant, contended, that the plea of the act of limitations could not affect the complainant's right of recovery. 1. The statute of limitations is not necessarily a bar in equity. It is often adopted there, but is also often rejected. In cases of this description, twelve years may often elapse before a bill can be filed in chancery without any laches of the obligee; because, before he can resort to chancery for relief, by sale of the real estate, it is necessary to ascertain the insufficiency of the personal assets. Of course no proceeding can be had in equity until the administration of the personal estate. There is no reason, therefore, to be given for applying the statute of limitations to cases like this. 2. In the second place, the plea is relied on only by one of the heirs. The other has abandoned it. As the law does not make it a bar to suits in equity, and one of the heirs abandons it, why should it be admitted in favour of the other? But here a suit was brought at law, and judgment recovered on the administration bond in 1802. At the time of its rendition, the situation of the personal estate, and whether sufficient to pay debts, was unascertained, and it was in consequence referred to Mr. *Mackubin*, to determine whether there were sufficient assets to pay the debts. The bill in this case was filed three or four years after the judgment at law. This judgment ought surely to be an answer to the plea of limitations, even if it had been insisted upon by both of the heirs.

Boyle, for the Appellees. The second answer of *R. G. Rawlings* does not withdraw the plea of limitations. It is an answer to the bill of injunction, and as such only answers the matters contained in that bill. The plea of li-

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mitations having already been put in by him, and the complainant not having replied to that plea, it was unnecessary to rejoin, and the plea could not have been again urged *by him*, unless in the nature of a rejoinder. He therefore, as well as his co-defendant, relies on that plea. The exhibit filed by the complainants, as proceedings had in *Anne-Arundel* county court, is not a part of the bill, and consequently is not a part of the case. It is not admitted by either of the defendants—is not referred to in either of the bills, nor does it appear at what time it was filed. Another fatal objection to this exhibit is, that it was referred out of court to Mr. *Mackubin*, who never made an award, and consequently there never was a certain and absolute judgment in the case. With respect to the plea of limitations—A court of chancery is bound by a positive law, as well as a court of law. The plea of limitations in this state, is founded on a positive law; therefore the court is bound to respect it. In *England* a bond is *presumed* to have been paid after a lapse of 20 years—there being no positive law relating to a bond, whereas in this state there is a positive law on the subject, and no court can contravene a positive law. Any analogy attempted to be drawn from decisions in *England*, founded on presumption, and those which may be found on positive statute, must fail—*Est boni judicis non dare sed dicere leges.*

DECREE AFFIRMED.

DECEMBER.

CARROLL, *et ux.* vs. SMITH.

Under what circumstances a copy of a private plot of the land in dispute may be read in evidence

The plaintiff in an action of trespass having had upwards of 20 years possession by enclosures of what was supposed to be lot No. 7, on which the trespass was charged to have been committed, cannot support his action for a trespass committed within the enclosures, if not on lot No. 7

If the sales of certain lots of land were made at public auction, or at private sale, by a plot, the purchasers have a right to hold the lots according to the location which was made on the plot; and evidence cannot be given that the surveyor, when running the lots preparatory to the making out the plot, run the division or other lines different from the lines located on the plot

APPEAL from *Baltimore* County Court. This was an action of trespass *q. c. f.* to recover damages for a trespass on part of a tract of land called *Swan Harbour*, No. 7. The general issue was pleaded, and the lands were located on plots returned under a warrant of resurvey for that purpose.

1. In the trial the plaintiffs, (the appellants,) having proved to the jury that they were legally entitled, in right of *Sophia Carroll*, one of the plaintiffs, to lot No. 7, part of *Swan Harbour*, containing 120 acres, agreeably to the true metes and bounds of said lot, under a deed from *Archibald Buchanan* to *John Pearce*, dated the 12th of April 1785, the defendant, (the appellee,) read in evidence a deed from the said *Buchanan* to *Harry Dorsey Gough*, under whom the plaintiffs claim lot No. 2, part of *Swan Harbour*, dated the 12th of April 1785, for 180 acres of the said land, describing the same by courses and distances. Also a bond of conveyance from the said *Buchanan* to the said *Pearce*, dated the 21st of April 1784, of a lot or piece of ground, being part of *Swan Harbour* No. 7, described

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by metes and bounds, containing 120 acres. The defendant also, to show the true location of lot No. 7, as originally sold by *Buchanan*, offered to give in evidence a paper purporting to be a plot of *Swan Harbour*, copied from an anonymous plot of said land, and of its division into eight lots, in the possession of *Samuel Vincent*, by *Jehu Bouldin*; and also offered evidence to prove, that the said land called *Swan Harbour*, was sold at public auction in eight different lots, numbered from No. 1 to 8, inclusive, by a plot which was made for that purpose by *James Baker*, except lots No. 1 and No. 7, and that lot No. 3 was sold to *Robert Ballard*, and lot No. 2 to the said *H. D. Gough*, and that lot No. 1 was afterwards sold to the said *Gough*, and lot No. 7 to *John Pearce*; and proved by *Samuel Vincent*, a competent witness, that he was for near 20 years the agent and clerk of the late *H D. Gough*, under whom the plaintiffs claim, during which time said *Gough*, who had then bought part of the land called *Swan Harbour*, gave to him, with other papers, a plot of *Swan Harbour* laid off into lots, and directed him to take care of said papers, but made no particular mention of said plot, or any other of said papers; that the witness did not know whether it was a correct plot, nor did he ever hear the late Mr. *Gough* say that it was, or say any thing on the subject of it, further than as aforesaid. The defendant also proved by *Jehu Bouldin*, another witness, that he copied said plot in the office of *Vincent*, and made therefrom the paper now offered in evidence, which he proved to be a true copy of the said plot, in the lines, words and figures, on said paper. It was further proved by *James Baker*, a competent witness, that he made the original survey and plot of *Swan Harbour*; that in making the said survey, he cornered lots No 2, No. 6, and No. 7, at the same place, which place he believes to be the place marked M on the plots returned in this case. That in making the division of the said tract into lots, he began one line at the place marked H on the plots, and ran into Tobacco-House cove, and as he believes to the said place marked M, for the division line between lots No. 2 and lots No. 1, 3, and 7; and that he was a commissioner many years ago on a commission to settle the divisional lines between lots No. 2 and No. 4, on one side, and lots No. 5 and No. 6 on the other, when the said divisional line was so settled as to terminate at the said place marked M. being the place at which he believes that lots No. 2, 6 and 7, originally cornered. And he further proved, that he saw in the possession of *James Carroll*, one of the plaintiffs, the said plot from which *Jehu Bouldin* copied the one now offered in evidence; that it had the general appearance of the plot he had made for said *Buchanan*, but he has no knowledge whether the same was a true copy from his said original plot, or by whom it was made, or whether it was a correct plot of the said lands. It was admitted that the original plot was lost, and that the said plot formerly in possession of the plaintiff *James Carroll*,

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was accidentally lost several years ago by certain land commissioners, to whom he had lent it, before the institution of this suit, and who were appointed by *Baltimore* county court to ascertain and settle the true location of the said lot No. 3, declaring to them that he had no knowledge whatever, and could obtain no information concerning the correctness of the said plot, but was willing to let it be recorded as evidence between the parties of the true location of the lots of *Swan Harbour*, as sold by *Archibald Buchanan*, which however was not done. The defendant then prayed the court, that upon the facts given in evidence, the said plot might be offered in evidence to the jury. To which the plaintiffs objected. But the Court, [*Nicholson*, Ch. J. and *Bland*, A. J.] overruled the objection, and permitted the plot to be given in evidence to the jury for the purpose aforesaid. The plaintiffs excepted.

2. The plaintiffs then offered evidence to prove, that in the year 1785 *John Pearce*, the purchaser and then proprietor of lot No. 7 of *Swan Harbour*, put up a fence from the letter A on the plot, to C, and from C to 49. And also from A to B, as said lot No. 7 is located by the plaintiffs; and that the plaintiffs, and those under whom they claim, have been in the peaceable possession of said lot as located by them, holding it under enclosures, and claiming it as and for lot No. 7, for 20 years and upwards next preceding the time of bringing the present action; and that the said land, located by them as lot No. 7, has for 20 years, and upwards, next preceding the bringing of said suit, been commonly known and called by the name of lot No. 7. And the plaintiffs prayed the court to direct the jury, that if they should believe this evidence they, the plaintiffs, were entitled to recover. Which direction the court refused to give, and the plaintiffs excepted.

3. The plaintiffs then gave in evidence, that at the sale made at public auction as aforesaid, of parts of *Swan Harbour*, which took place on the 15th of October 1783, the lots No. 1 and No. 7, nor either of them, were sold, and that lot No. 3, which was then sold to *Robert Ballard*, was soon afterwards relinquished by him to the said *Archibald Buchanan*, who afterwards sold it to *James Gittings*, and conveyed it to him by metes and bounds, without any reference whatever in the deed of conveyance to any plot or division, by a deed bearing date on the 24th of December 1784. And also gave in evidence, that on the 21st of April 1784, the said *Archibald Buchanan*, the proprietor of *Swan Harbour*, sold the said lot No. 7 to *John Pearce*, by a bond of conveyance of that date; and also gave in evidence a deed, dated the 12th of April 1785, whereby the said *Buchanan* conveyed lot No. 1, part of *Swan Harbour*, to *Harry D. Gough*, by metes and bounds. The defendant offered no evidence to prove that the said lots No. 1. and No. 7, or either of them, were sold

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at any time, or to any person, at public sale, or any evidence that they, or either of them, were sold by a plot, other than the circumstance that a plot and division of *Swan Harbour* was made as aforesaid, and that the said plot and division was exhibited at the said public sale to the auctioneer and bidders, and the other circumstance, that in the deed executed by *Buchanan* to *Pearce* for lot No. 7, pursuant to the said bond of conveyance, the said lot is described "as all that part of *Swan Harbour*, known and distinguished on the plot thereof as lot No. 7," and other than the matters before stated; and the defendant offered no evidence, except that before stated, of the existence of the original plot of *Swan Harbour*, nor of the manner in which the lines thereof were run, or in which the said tract was thereon divided into lots, nor of the lines and boundaries of these lots as thereon laid down. The defendant then prayed the opinion of the court, and their direction to the jury, that if the jury believe the sales of lots No. 7, 8 and 1, were made at public auction, or at private sale, by a plot, the purchasers, and those claiming under them, have a right to hold the lots according to the location which was made on the plot by which they were sold; and that the plaintiffs cannot give evidence that the surveyor, when running the lots preparatory to the making out the plot by which the sale was made, run the divisionary or other lines different from the lines located on the plot. Which direction the court gave. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Harper, for the Appellants. 1. On the *first* bill of exceptions he contended, that there was no evidence that the plot offered in evidence was a genuine one, and a true copy of that under which the purchase was made. The rule is, that a copy cannot be given in evidence without proof and notice to produce the original.

2. On the *second* bill of exceptions he contended, that the plaintiffs, having had 20 years possession by enclosures, of what was supposed to be lot No. 7, it was sufficient for them to support a trespass committed within the enclosures.

3. On the *third* bill of exceptions he insisted—1. That it was not proper to leave it to the jury to find the lots were sold at private sale by a plot. 2d. And if proper to leave it to the jury, the purchasers were not bound by the plot, if they could show a mistake in the plot. 3d. That there was no evidence of the existence of a plot to which the attention of the jury was to be called; and 4th. That the plaintiffs were not precluded from showing that the surveyor, in making the plot, committed a mistake, and that it was not made pursuant to the running.

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Martin for the Appellee, on the *second* bill of exceptions referred to 1 *Esp. Dig.* 310.

THE COURT agreed with the County Court in the opinions expressed in each of the bills of exceptions.

JUDGMENT AFFIRMED.

DECEMBER.

M'MEEHEN & SULLIVAN vs. MAGGS.

A bill filed in chancery by J M stating, that being the owner of a certain number of shares of stock in a bank, on the marriage of her daughter to J L, and with a view to advance him by making him appear to be the owner of those shares, she caused them to be transferred to him in 1805, under a private agreement that she should have the dividends during her life, and if she died before her daughter that the stock was to belong to her daughter, subject to her sole and absolute use and disposal. In 1806 J L, about to purchase a house and lot solicited J M, to which she consented, that the stock should be sold to raise money to aid him in paying for the property, he promising to convey it to secure to her and his wife the money the stock should bring, thereby to change her right to the stock into a lien upon the property to an equal amount. The stock was sold, and J L received and applied the proceeds in part payment of the property; and having paid the whole purchase money, received a conveyance therefor in August 1806 J L, though applied to for that purpose, refused to perform his promise, and after the death of his wife, positively refused either to pay the amount of the money produced by the stock, or to give a conveyance on the house and lot—*Decreed*, that J L should pay to J M the sum of money received for the stock, with interest, &c. and if not paid by, &c. the property should be sold, &c. The money not being paid, the property was sold in April 1811, and the sale ratified. Before the sale and ratification, M & S petitioned the chancellor, stating that at the solicitation of J L they had in 1807, 1808 and 1809, endorsed for him sundry promissory notes, under an agreement that if they were not regularly taken up by J L, he would give to them a mortgage on the above mentioned house and lot. That M & S were compelled to take up the notes, and J L in July 1809, executed to them a mortgage of the property, according to the engagement above mentioned. When M & S endorsed the notes for J L, they had no knowledge that any person had any claim, either legal or equitable, on the house and lot. In February 1810, J L gave an absolute deed to M & S for the property When the mortgage and deed were executed, M and S are supposed to have had knowledge of the men of J M. J M before filing her bill against J L, brought suit against him at law, and in March 1809 obtained a judgment for the amount of her claim for the stock. M & S, by their petition, prayed a suspension of the sale, &c. The sale was not suspended, but the chancellor intimated that the sale, when made, would be subject to the ratification of this court, and M & S would then be heard, &c. Afterwards he *decreed*, that the petition be dismissed—which on appeal was *affirmed*

APPEAL from the Court of Chancery. On the 22d of March 1809, *J. Maggs*, (now appellee,) filed her bill against one *J. F. Levy*, stating, that holding 13 shares of stock in the *Union Bank of Maryland*, and one share in the *Bank of Baltimore*, on the marriage of her daughter *Ann* to *Levy*, and with a view to advance him by making him appear to be the owner of those shares, she caused them to be transferred to him in the year 1805, under a private agreement that she should have the dividends accruing thereon during her life, and upon her death before her said daughter, the said stock was to belong to her said daughter, subject to her sole and absolute use and disposal. That in July 1806, *Levy* being desirous to purchase from one *J. Fowble* a house and lot in *Eutaw street*, in the city of *Baltimore*, the complainant was solicited to give her consent, and she did give her consent, that the stock in the *Union Bank* should be sold to raise money to aid him in paying for the house and lot, he positively promising the complainant to convey and make over the house and lot, to secure to the complainant, and his wife, the money which the stock should bring; thereby agreeing to change the rights of the complainant to the stock, and the dividends thereof, as above set forth, into a lien upon the house and lot to an equal amount, the interest thereon to be paid yearly. That the stock was sold on the 21st of August following, and produced the sum of $1384 50, which *Levy* received, and applied in part payment for the house and lot; and he having fully paid for the same, received a conveyance therefor from *Fowble* on the 22d of August 1806. That *Levy*, although applied to, &c. refused to perform his said promise, &c. And since the death of the said *Ann*, which happen-

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ed in December 1808, he had positively denied and refused either to pay to the complainant the amount of money produced by the sale of the stock, or to replace the same, or to give the said conveyance on the house and lot to secure the same, or even to pay the last year's interest due thereon—the former interest being paid by him. That he also refused to make her any satisfaction for the one share of stock in the *Bank of Baltimore*, or to transfer the same to her, or even to pay her the dividends thereon received by him. *Prayer* for a decree to compel a transfer of the one share of stock in the *Bank of Baltimore*, also to cause and procure to be transferred and returned to her 13 shares of the stock in the *Union Bank*, or to secure the payment of the said amount received by him for the same, with interest thereon, by a conveyance and mortgage of the house and lot, &c. Also for general relief. On the coming in of *Levy's* answer, and the return of testimony taken under a commission issued for that purpose,

KILTY, Chancellor, (December term 1810)—*Decreed*, that the defendant should transfer to the complainant one share of stock in the *Bank of Baltimore;* and that he should pay to the complainant the sum of $1467 57, being the sum received for the *Union Bank* stock, $1384 50, with one year's interest thereon, and also with interest on the said sum of $1384 50 from the 22d of March 1809, (being the time of filing the bill,) until paid, and costs. *Decreed* also, that in case the defendant should not pay to the complainant the sum so decreed to be paid on or before the 1st of March 1811, the house and lot in *Eutaw-street*, in the proceedings mentioned, should be sold, &c.

The sum of money decreed not having been paid, the trustee appointed for that purpose made sale of the house and lot on the 1st of April 1811, to *W. W. Taylor*, for the sum of $5000, which was ratified on the 17th of June 1811. On the 25th of March 1811, *M'Mechen* and *Sullivan*, (the now appellants,) filed their petition, stating that the said *Levy* being seized and possessed of a house and lot in *Eutaw street*, in the city of *Baltimore*, applied to them to advance him a sum of money, or to become his endorsers on certain promissory notes to be discounted at bank, and that the said house and lot should be pledged for such accommodation; and that unless the notes so to be endorsed were regularly taken up by him when required, he would give a mortgage on the house and lot to secure them from loss. That they being thus applied to, and knowing *Levy* to be seized and possessed of the said house and lot, and believing him to be a man of honour, and willing to assist him if secured against final loss, they did agree with him, upon these his proposals, to lend him their names and credit to enable him to engage in business for the support of himself and family, being the objects he stated to have in view, and that they did in 1807, 1808 and 1809,

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advance upon their paper and credit to him, the sum of $5000, when they were informed that he could not, on reasonable terms, have an accommodation, in consequence of which, they (being then the makers and endorsers for him of sundry promissory notes,) were compelled to take up the said notes, and to receive from him a mortgage of the said house and lot, which he executed to them on the 8th of July 1809, according to the engagement made by him to them, and on the faith of which they originally became bound for him, and gave him their credit. That at the time they advanced their credit to him, they had no knowledge that any person had, or pretended to have, any claim either legal or equitable on the said lot and premises; and that they would not have accommodated him had they not believed that he had an indefeasible title to the same in law and equity; and that he was able, and would, when required, mortgage to them the same; and that he being unable to pay said advances, afterwards, on the 23d of February 1810, gave an absolute deed to them for said house and lot. That since they accommodated the said *Levy*, a certain *J. Maggs*, (the defendant,) filed a bill against him, setting forth some private claims against him, and insisting that she had, by virtue thereof, some equitable lien against the said property, and has by a decree of this court obtained an order for the sale thereof, and a certain T. B. has been appointed trustee to make the sale, who has advertised the same for sale on, &c. That they were not parties to the said suit or decree, and that *Maggs*, long before she filed her bill against *Levy*, commenced suit against him in *Baltimore* county court, and at March term 1809, obtained judgment against him for the same sum of money, which has been decreed to be paid her by *Levy*, or the said house and lot be sold for the purpose of satisfying the same, and as they understand for the same claim, as will appear by the said judgment, &c. by which they conceive she has made her election, and if she ever had any claim on the said property, that she has voluntarily relinquished the same by the recovery of her judgment in *Baltimore* county court. That if she had not so prosecuted her claim at law, they insist that by the said decree she can have no claim upon the property to their prejudice. *Prayer* for an order to the trustee to suspend the sale; and a *subpena* to *Maggs* and *Levy* to answer, &c. and abide by the further order and decree of this court in the premises. The chancellor did not suspend the sale, stating that the sale when made would be subject to the ratification of the court, and the petitioners might be heard on the subject of their application, according to the notice that would be given. It was agreed that a commission might issue to take the deposition of *Levy* to be evidence in the cause, subject to any legal objection. The answer of *Maggs* stated, that she had no knowledge of any sum of money being due from *Levy* to the petitioners. It stated the bill filed by her against *Levy*, and the proceedings

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and decree therein; she admitted a suit was brought by her at law against *Levy*, on the 1st of March 1809, and that judgment was obtained on the 10th of May 1810, for $1448 50, being the amount for which *Levy* had sold the stock mentioned in the proceedings, and some dividends received by him. That she did not relinquish her lien by proceeding at law, and sets out her ignorance upon the subject; but that she did not mean to receive a double satisfaction. That *Levy* having become insolvent, and the petitioners having obtained a conveyance of the house and lot before mentioned, before the judgment was obtained, she was prevented from and deprived of all benefit of her said judgment or remedy at law. That *M'Mechen*, one of the petitioners, was informed by her, and others, of her claim upon the property before she had either commenced the said suit at law, or filed her bill in this court. That he was counsel for *Levy* in both of the said suits, and appeared for him as counsel from the beginning to the end of both suits. That *Levy* advertised the house and lot for sale on the 27th of June 1809, in one or more newspapers in *Baltimore*, where the parties then and still reside. That two or three days afterwards, she published in the same newspapers, immediately under *Levy's* advertisement, a caution to all persons not to buy the property, stating her lien, and its prosecution in this court, which advertisements, and their contents, she is well satisfied were seen and known to both of the petitioners when they appeared in said newspapers, and before they took the mortgage from *Levy*. That the mortgage and absolute deed from *Levy* to the petitioners are fraudulent as to her, and cannot avail to her prejudice, inasmuch as both of the petitioners had knowledge of her lien on the property, when they received said conveyances. That the petitioners, although informed of the proceedings in this court by her against *Levy*, to enforce her lien, both before and after the mortgage and absolute conveyance, yet the claim they now urge was never made known to this court, nor interposed against her, until after a decree had passed. Nor did she know or even hear of such claim, until shortly after or at the time she obtained judgment against *Levy*, and it was then through her counsel, on some proposal of compromise. That knowing that her claim is just and right, &c. she prays that it may be paid to her out of the proceeds of the sale. Testimony was taken under commissions, and by agreement the testimony taken in the case of *Maggs* against *Levy* was admitted in evidence in this case. The death of *Levy* was suggested.

Kilty, Chancellor, (July term 1812.) The prayer of the petition was, that this court would order the trustee to suspend the sale until further order, and it is not perceived that any other relief was prayed. This order was refused, but it was stated that the petitioners might be heard thereafter. The chancellor is of opinion, on consideration

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of the proceedings and arguments of the counsel, that there is nothing to entitle the petitioners to the interposition of this court. *Decreed*, that the petition be dismissed, but without costs. The petitioners appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Martin, for the Appellants. The question is, who had the first lien on the house and lot, the appellants or the appellee? He contended that the contract alleged by the appellee was, as to creditors, illegal; that it gave to *Levy* an appearance, without the reality, of property. That if it was valid, yet the appellee was only to have the dividends. the rest of the interest was vested in *Levy's* wife, and as it was personal property, on her death it belonged to the husband. He also contended, that as the appellants were ignorant of any interest the appellee might have had in the property at the time they became endorsors, although they became acquainted with it before they obtained their mortgage and deed, still the mortgage and deed must prevail. That a person who has an equitable right, if he obtains the legal estate, will prevail over a prior equitable right, provided he was ignorant of such prior equity originally, although he may become informed of it before the legal right is obtained 2 *Fonbl.* 306, 309, *(note* e.*)* That the appellee made her election to proceed at law, she was therefore precluded from proceeding in equity. Upon the principle of election, if a person has two remedies, one at law and one in equity, if he proceeds at law, he is precluded from going into equity, and so *vice versa.*

Kell, for the Appellee. The appellants might have become parties to the original suit, and brought forward their claim. Having neglected to do so, they are now precluded. Their bill only prayed a suspension of the execution of the decree in the former case, and no other relief. The decree in the former case was a proper decree, and cannot be now reversed. The appeal in this case is from the refusal of the chancellor to suspend the sale; and if this court considers that the chancellor did wrong, can they reverse the original decree? The sale was not suspended, but has been made and ratified. Can this court now set it aside? As to the matter of election urged by the appellants, it is answered that they ask the aid of a court of equity to enforce that election, (if it is such,) whilst they have, by the joint act of themselves and *Levy*, the defendant in equity, rendered that election or remedy unavailing, by obtaining the mortgage from *Levy*, the defendant, after the bill was filed, and notice in fact of the appellee's lien—2 *Fonbl.* 156, 157, *(note)*, 309, 471. To the same objection, and also that insisted on of uniting the junior equity to the legal estate so acquired, it is answered, that the

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bill in the case of *Maggs vs. Levy* seeks no new right—none by the decree could be created. It only enforces the right existing at the time the bill was filed. The decree operating upon the state of things, and rights existing, at the time of the bill filed, has relation back to that period, and binds the parties. Hence the mortgage cannot in equity be viewed as fair and equitable, or the mortgagor and appellants permitted by such means to deprive the decree of its proper office and effect.

Pinkney, in reply. The petition in this case contains a prayer for general relief, as well as a suspension of the sale in the case of *Maggs vs. Levy*. This proceeding was not to set aside the decree in that case, which was a good decree as between the parties. The appellants could not interfere with the proceedings in the other case—they were not parties, and it could not injure their rights. A bill of interpleader does not apply to it. It was time enough for the appellants to file an original bill when they found the court was about to interfere with their interest. They did not know that the chancellor would decree a sale. It is every day's practice to suspend proceedings in chancery similar to the suspension of an execution on a judgment at law. It is not to interfere with the decree, but to bring a new case before the court, in which there are different facts, different parties, and different interests. If these interests are good, then the former decree is finally suspended. Notice of *Maggs'* bill does not affect the right of the appellants more than if no bill had been filed by her against *Levy*. A proceeding in a court is presumptive notice, but it never produces any effect except between the parties to the proceedings. 2 *Fonbl.*, 156. It could operate no further than express notice, which could not interfere with the appellant's prior equity. If their equity was perfected before the equity of the appellee, then the bill by her against *Levy* does not affect their case. The suit at law was no notice but of what the declaration contained. A bill in chancery is notice of nothing more than what is contained in it. The proceeding at law was negative notice of any equitable claim. By her proceeding at law the appellee elected how she would proceed How could she proceed at law while the equitable claim remained under the contract she sets out in her bill? Her suit at law demanded a reimbursement of the whole sum. In equity her demands are different. On a disaffirmance of the contract she could proceed at law, and on no principle, but on rescinding the contract, could she proceed at law; and by doing so, she considered the contract as at an end and rescinded, and the money in the hands of the borrower for the use of the lender. *Levy* failed to execute the contract, and she proceeded at law for money had and received. If a suit is brought at law, is not relief in equity given up? Suppose a contract by parol for the sale of land, and the purchase money is paid, but the party refuses to convey.

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Here there are two remedies, at law or in equity, to recover back the purchase money, (disaffirming the contract,) or to file a bill to enforce the contract. But if the contract is disaffirmed, and a suit is brought at law for money had and received, the party cannot resort to equity for relief. The party has made his election, and he cannot have both remedies—if resort is had to one, the other is abandoned. When the mortgage deed was executed to the appellants, the appellee had no equitable claim—she had abandoned any she might have had by proceeding at law. She ought to have abandoned her suit at law by a discontinuance when she found *Levy* was insolvent; but instead of that she proceeded to judgment. The stock, while it stood in *Levy's* name, was affected by the appellant's lien. Standing in his name it gave him credit, and any secret contract was fraudulent against creditors. The change to the house and lot did not alter the case. It bettered it, as it was a visible object. There was a legal conveyance to *Levy*, which was recorded, and it was notice to all the world, so that any person was as well justified in crediting him upon the house and lot, as upon the stock. Shall a latent equity be set up to defeat honest creditors? It will not be tolerated that an equity lying hid and in secret, may be brought forward after creditors have lent their money without any knowledge of it. Under a belief of a solid security the money is loaned by the appellants—they are deceived and defrauded The appellee does not deny the facts alleged in the appellant's bill, but puts them upon their proof. *Levy* had no interest, though made a defendant. When he was examined as a witness he had no interest—having been discharged as an insolvent debtor. A defendant may be examined in a cause in equity—one co-defendant may be examined against another. The court may order him to be examined, and if he is disinterested, he is a competent witness. Here there was an agreement to take *Levy's* deposition, and his testimony proves the appellant's equity. To set him up in business the appellants lend him their responsibility. This continued in 1807, 1808 and 1809, by renewal of the notes—*Levy* not being able to take them up. There was notice in 1807 or 1808 of the appellee's equity. In 1809 there was presumptive notice by the bill. The express notice was in June, and the mortgage in July 1809. It must be presumed that all the advances by the appellants were made before 1809. The whole was made in 1807, when *Levy* set up in business; and it cannot be inferred that the advances were made after the notice of the appellee's equity. Their equity was perfected before they had notice of the equity of the appellee.

DECREE AFFIRMED.

BEVANS, *et ux.* vs. BRISCOE. 1816. MAY (E. S.)

BEVANS vs BRISCOE

APPEAL from *Kent* County Court. This was an action for the use and occupation of 500 acres of land called *Stapley's Lot*. The general issue was pleaded.

1. The plaintiffs below, (the present appellants,) proved that the defendant had used and occupied the land, mentioned in the declaration, from April 1811 to the end of the same year, and that it was the property of *Ann*, the female plaintiff, whilst she was sole. They also proved its value. The defendant then offered evidence to prove, that a certain *David Lamb*, the former husband of the female plaintiff, did early in the year 1810, lease the said land, by a parol agreement, to the defendant, for the years 1810 and 1811, reserving as rent therefor one third of the corn, and one third of the wheat which might be grown during the term; that the land was contained in one field, consisting in part of woodland, and the residue cultivated in corn in the year 1810, and seeded in wheat in the fall of 1810 by the defendant. That *Lamb*, in November 1810, agreed with the defendant to alter the nature of the rent, and in pursuance of that agreement did receive and take the bond of the defendant, conditioned for the payment of the sum of $300 for the said rent, to be paid to *Lamb* in August 1811, which bond was assigned by *Lamb*, on the 1st of December 1810, to *William Harris*. That *Lamb* died in April 1811; and that the defendant paid and satisfied *Harris* the money due on the bond in August 1811. The defendant then prayed the court to direct the jury, that if they should be of opinion from the evidence, that *Lamb*, in the fall of 1810, agreed with the defendant for the rent of the farm for 1811, and that the defendant gave his bond to *Lamb* for the rent, amounting to $300, payable sometime in August 1811; and that *Lamb*, on the 1st of December 1810, assigned away the bond to *William Harris*, who in the fall of the year 1811, received the money due on the bond from the defendant, that then the plaintiffs could not recover the said rent, or the proportion thereof, from the month of April 1811, the time when *Lamb* died. Which direction the Court, (*Earle*, Ch. J.) accordingly gave. The plaintiffs excepted.

2. The plaintiffs then prayed the opinion of the court to the jury, that they, the plaintiffs, were entitled to a verdict for the value of the land used and occupied by the defendant, from April 1811 till the end of the same year, as well that part on which the wheat was growing at the death of *Lamb*, as for every part thereof, and while the wheat was growing thereon. But the court refused to give this

If a tenant for life make a lease for years, and dies before the expiration of the term, the under tenant, or tenant for years, if he has sown the lands, is entitled to the crop, and has the right of ingress, egress and regress, to preserve, gather, and carry it off.

Where tenant for life dies in possession, the reversioner or remainderman is not entitled to the occupation of the lands on which a crop is growing, until that crop is taken off, or a reasonable time is given for taking it off; and the law is the same where the lands are leased for years to an under tenant.

If tenant for years occupies the premises after the emblements are taken off, the remainderman is entitled to recover the use and occupation.

B, the husband of A, by a parol agreement in the fall of 1810, leased her lands to C for the year 1811, and C gave his bond to B for the rent, payable in August 1811, which B assigned to W, and in August 1811, the bond was paid by C. In April 1811 B died. Part of the lands was seeded in wheat in the fall of 1810, and the residue was wood land. A brought an action against C for use and occupation from April 1811 to the end of that year—*Held*, that she was not entitled to recover for the value of the land used and occupied by C from April 1811; that C was entitled to the wheat growing, & had a right to enter for the purpose of securing it; and for the time the wheat was growing, and until it was taken off, he was not liable to pay for the use and occupation of the land on which it was growing. That the parol lease of B determined with his decease, and C, as his tenant, had no right to possess the demised premises, except to preserve the crop; and if he occupied them, or any part of them, for any other purpose, he was liable to A for the use and occupation thereof.

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opinion, being of opinion that the defendant was entitled to the wheat growing, and had a right to enter, for the purpose of securing the same; and for the time the wheat was growing, and until he had secured the same and taken it off, he was not liable to pay for the use and occupation of the land on which it was growing. The court were further of opinion, that the parol lease of *Lamb* determined with his decease, and the defendant, as his tenant, had no right to possess the demised premises; and if he occupied the same, or any part of them, he was liable to pay to the plaintiffs for its use and occupation. The plaintiffs excepted. Verdict for the plaintiffs, and damages assessed to $20, which sum not being within the jurisdiction of the court, judgment was entered for the defendant. The plaintiffs appealed to this court.

The cause was argued before NICHOLSON, JOHNSON, and MARTIN, J.

Chambers, for the Appellants, cited the stat. 11 *Geo.* II, *ch.* 19, *s.* 14, 15, giving executors of a tenant for life an action for a proportion of rent. The husband of *a feme* tenant in fee, is to be considered as tenant for life. *Co. Litt.* 351 *a.* 273 *b.* A reversioner is entitled to recover from the time of the death of the tenant for life. *Jenner vs. Morgan*, 1 *P. Wms.* 392.

Tilghman, for the Appellee, referred to 6 *Bac. Ab.* tit. *Rent*, 14. *Rockingham vs. Penrice*, 1 *P. Wms.* 177. *Shuttleworth vs. Garrett*, 1 *Shower*, 35. 2 *Blk. Com.* 144. *Littleton vs. Burns*, *Leon.* 136; and 1 *Pow. on Cont.* 156.

NICHOLSON, J. delivered the opinion of the court. The law is well settled, that where tenant for life makes a lease for years, and dies before the expiration of the term, the under-tenant, or tenant for years, if he has sown the lands, shall reap them; or in other words, that he is entitled to the emblements. *Co. Litt.* 50. 2 *Blk. Com.* 145,

Prior to the statute 11 *Geo*, II. *ch.* 19, if tenant for life, who made a lease for years, died before the day on which the rent was payable, his executors had no remedy for the recovery of the rent from the tenant for years, to whom in fact it became a donation. By that statute, however, (section 15,) a remedy is provided, and the executors of tenant for life may recover a proportion of the rent to be computed to the time of the death of tenant for life. Before and since the statute, the reversioner or remainderman had the same right to enter upon the tenant for years, as he had to enter where tenant for life died in possession. If executors of tenant for life held over, the remainderman or reversioner had his action against them, and might recover a compensation for the wrong done to him in holding over. He may, since the statute, recover in an action for use and occupation. He has the same remedy against tenant for years who holds over. The question then is, in what re-

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spect shall the tenant for years, or executors of tenant for life, be said to hold over, so as to be subject to the action of the reversioner or remainderman? It being settled, that tenant for life, and his under-tenant for years, are entitled to the emblements, it is equally well settled that he has the right to ingress, egress and regress, to preserve the crop, to gather it, and to carry it off. It must necessarily follow that in doing this he is no trespasser upon, nor a tenant holding under the remainderman or reversioner. The *fifteenth* section of the statute provides a remedy for the executors of tenant for life, but gives no remedy to the remainderman or reversioner, nor does it place him in a better situation than he was before. The *fourteenth* section embraces him, as well as all other persons, in the general provision which gives the action for use and occupation. His rights are precisely what they were before the statute, although the nature of his remedy may be somewhat changed. Where tenant for life dies in possession, the reversioner or remainderman is not entitled to the occupation of the lands on which a crop is growing, until that crop is taken off, or a reasonable time is given for taking it off; and the law must be the same where the lands are leased for years to an under-tenant, who has all the rights which the executors of tenant for life would have had if he had died in possession.

If tenant for years occupied the premises after the emblements were taken off, the remainderman was entitled to recover for the use and occupation; and so the court instructed the jury, as stated in the *second* bill of exceptions.

Some further provisions may be necessary on this subject, but these are for the legislature to make.

The court agree with the court below in the opinions given in both of the bills of exceptions.

JUDGMENT AFFIRMED.

E. Massey vs. J. Massey's Lessee.

J. Massey's Lessee vs. E. Massey.

May (E. S.)

A F was, by a decree of the court of chancery, appointed a trustee to sell certain lands for the payment of the debts of W F, deceased,

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and authorised, upon the confirmation of the sale and receipt of the purchase money, to execute a conveyance to the purchaser, and his heirs. A F sold the lands to J M, and the sale was confirmed by the chancellor. J M, the purchaser, died intestate, leaving B M and C M his heirs at law, to whom A F the trustee, conveyed the lands purchased by J M—*Held*, in an action of ejectment to recover the lands, that the deed might be read in evidence.

Where a sale is made by a trustee appointed by decree of the court of chancery, which is ratified, the legal estate, on the death of the purchaser, the purchase money being paid, does not vest in the heir at law of the purchaser, without a deed from the trustee

A commission to make partition of lands, and the return thereto, not permitted to be read in evidence, the commission being defective, inasmuch as the oath of the commissioners was not annexed to it, and the commission and return did not appear by evidence to have been ratified by the court.

A will executed in 1804, devising real and personal estate, was decreed by the orphans court to have been impliedly revoked, and was refused to be admitted to probate. On appeal to the court of chancery, the decree of the orphans court was affirmed. In an action of ejectment, to recover the lands devised thereby, the will was offered in evidence by the plaintiff—*Held*, that the decision of the orphans court and court of chancery was not conclusive, and that the plaintiff might prove the execution of the will.

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sey's Part of Friendship Corrected, *Spry's Chance*, *Collin's Range*, and *Friendship*. General defence, and issue.

Parol evidence is not admissible to prove that a testator had frequently declared, and on the day before his death, and some time after the execution of a paper purporting to be his last will, that he had made a will and believed he had destroyed it; that as he could not find it, he supposed he must have destroyed it, but was uneasy about it, as he intended and wished to alter it, and requested the witnesses to go to his house for that purpose.

H M, being a married man, made his will in May 1804, and afterwards had two children, one in January 1805, and the other in June 1807 In July 1804 he acquired by purchase 399 acres of land, and in August 1805, in like manner 76 acres of land more, of which he died seized—*Held*, that the will was in force, and as such admissible in evidence.

Where the verdict for the plaintiff in an action of ejectment was for certain lands as mentioned and included in certain conveyances set forth in the verdict, and judgment was thereon rendered for the plaintiff.

1. The plaintiff at the trial read in evidence the patent of one of the tracts called *Friendship*, granted to Col. *Richard Tilghman* the 10th of October 1732, and traced a regular title down from *Tilghman* for part of *Friendship*, to *William Falconer*. He then read in evidence the patent of the other tract called *Friendship*, granted to *Francis Spry* the 11th of September 1728, and traced a regular title in part of the same land to *William Falconer*, who he proved was dead; and then read in evidence the proceedings in the court of chancery in November 1794, on a bill filed by *Comegys* and others against the heirs of the said *Falconer*, to show that his real estate was sold by a decree of that court for the payment of his debts. That *Abraham Falconer* was appointed the trustee to make the sale, who was directed to execute a bond, give notice, &c. and after the sale to make report of his proceedings to the court of chancery; "and that upon the ratification and confirmation of the sale, and upon the receipt of the purchase money, the said trustee, by a good deed indented, to be acknowledged and recorded agreeably to law, shall give, grant, bargain and sell, release and confirm, unto the purchaser or purchasers of the said land, or parcel thereof, and his, her, or their heirs, the land to him, her or them sold, and all the right, title, interest, and estate therein, which from the deceased hath descended, or by him hath been devised unto the defendants, or any of them; and the purchaser or purchasers, and his, her or their heirs and assigns, shall thereupon be entitled to hold the same free, clear and discharged, from all claims of the said defendants, or any of them, claiming by, from, or under the deceased." That sales of the real estate were made, and that *Abraham Falconer*, the trustee, sold the same to a certain *James Massey*, on the 4th of April 1795, and on the 17th of August 1795; which sales were approved, ratified and confirmed, by the chancellor, on the 24th of June 1795, and 22d of December 1796. The plaintiff then proved that *James Massey*, the purchaser, died intestate in the year 1795, and left *James Massey* and *Joshua Massey*, his only children and heirs at law; and then produced and offered to read in evidence, the deed of *Abraham Falconer*, the trustee, to *James Massey* and *Joshua Massey*, the sons and heirs at law of the said *James Massey*, under whom the plaintiff claims, dated the 11th of January 1799. To the reading of this deed in evidence the defendant objected, on the ground that *Abraham Falconer*, the trustee, had no power or authority to convey to any person but to *James Massey*, the purchaser, and that the deed from the trustee to *James Massey* and *Joshua Massey*, heirs at law of *James Massey*, under whom the lessor of the plaintiff claimed, did not convey such a title as would enable him to support the action for the parts of the land aforesaid; and

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the Court, [*Purnell*, A. J.] being of this opinion, refused to permit the deed to be read in evidence to the jury. The plaintiff excepted.

2. The plaintiff then proved the payment of the purchase money to *Abraham Falconer*, the trustee, by *James Massey*, the executor of *James Massey*, the purchaser, and prayed the court to direct the jury, that the legal estate and title in the lands sold by *Abraham Falconer*, was vested in the heirs of *James Massey*, the purchaser, under the decree of the chancellor, by operation of law, on the payment of the purchase money, without a deed from the trustee. But the court refused to give this direction, being of opinion that the legal estate in the lands in question could not be conveyed agreeably to the acts of assembly in this state, otherwise than by deed enrolled, from the trustee to the purchaser. The plaintiff excepted.

3. The plaintiff then produced the original commission issued from the county court of *Queen Anne's* county on the 3d of November 1797, on the petition of *James Massey*, filed at October term 1797, stating that he, together with *Joshua Massey* an infant, under the age of 21 years, were seized in fee simple of the following parcels of land lying in *Queen Anne's* county, to wit, part of a tract called *Friendship*, part of a tract called *Spry's Friendship*,, and part of a tract called *Massey's part of Friendship Corrected*, a tract called *Spry's Chance*, and part of a tract called *Hazard*, which descended to the said *James* and *Joshua*, and prayed that a commission might issue to make division of the same agreeably to the act of assembly in such case made and provided; which commission was directed to *Benjamin Roberts*, and four other gentlemen who were appointed by the court commissioners to act in the premises agreeably to law, &c. who afterwards certified to the said court, under their hands and seals, on the 29th of November 1797, "that pursuant to the annexed commission to us directed, we have given notice of our intentions of meeting on the lands mentioned in said commission, to all the parties interested, and have taken the oath by law directed, and having appointed and qualified *Cornelius Comegys* surveyor, and *John Comegys* and *David Spry* chain-carriers on the occasion, we have caused the several tracts and parts of tracts or parcels of land mentioned in said commission to be carefully surveyed; by which there appears to be included in the several tracts or parts of tracts of land aforesaid the quantity of 459 acres; and as the quality of the land, and the improvements thereon, are as nearly equal as possible, we have caused the same to be equally divided, hereby assigning to *James Massey* that part lying," &c. "and the part lying," &c. "unto *Joshua Massey*, as will more fully appear on the plot of the whole hereunto annexed." Together with the endorsements made by the late clerk of *Queen Anne's* county court on the said commis-

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sion, viz. "Commission and return on the division of *James Massey's* lands—Received May 17th, 1798, and the same day was, with the endorsements thereon, recorded in lib. R T, No. 3, one of the record books for *Queen Anne's* county.

Saml. T. Wright, Clk."

It being objected that the commission was irregular and defective, in as much as there was no oath of the commissioners annexed to it, and that the commission did not appear to be ratified. The plaintiff, for the purpose of showing the correctness of the commission, and of the return, and the practice of the clerk's office of *Queen Anne's* county, produced the record of the said commission from the record book, which is as follows, viz. "*Queen Anne's* county, to wit: At another time, to wit, on the 23d day of October *anno domini* 1797, the state's commission for the *examination of evidences to prove and perpetuate the memory of the bounds of a tract of land*, part of a tract of land called *Friendship*, part of a tract called *Spry's Friendship*, part of a tract called *Massey's Part of Friendship Corrected*, a tract called *Spry's Chance*, a part of a tract called *Hazard*, was issued out of *Queen Anne's* county court to Messrs. *Benjamin Roberts*," &c. "of *Queen Anne's* county, gentlemen, directed, according to the form of the act of assembly in such case made and provided; the aforesaid *Benjamin Roberts*," &c. "to the court here make return of the same commission, with their proper hands thereto subscribed, and seals affixed, in manner and form following, to wit:" [Here follow the commission, return and plot as before stated.] And for the purpose of accounting for irregularity and want of form in the record of the commission, referred to the records of commissions in like cases in the same record books, many of which appeared in like form. And in order to support the commission itself, and to show that it was good without having the oath annexed by the clerk to the commission, referred to commissions of like kind issued from the county court of *Queen Anne's*, all of which, down to the said year, appeared in like form, and many of which were proved to be ratified by the court by actual entries made by the clerk on his minutes, and by the endorsement of the word "*confirmed*," endorsed on the commission, in the hand-writing of the clerk. And for the purpose of furnishing evidence that this commission was ratified by the court, the plaintiff produced sundry commissions of like nature, which had been recorded on the records, although no other evidence was furnished from the minutes, or other entries, of the said late clerk of *Queen Anne's* county court, that the same had been ratified by the court. But the court were of opinion, that the commission was defective, because the oath of the commissioners was not annexed to the same, and because the commission and return did not appear by evidence to have been ratified by the court; and therefore refused to suffer the plaintiff to read either in evidence to the jury. The plaintiff excepted.

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4. The plaintiff produced a paper, purporting to be the last will and testament of *Hemsley Massey*, dated the 13th of May 1804, and executed in the presence of three witnesses, whereby he bequeathed certain legacies to several of his relations, and devised to his executors, in trust for his wife during her life, sundry tracts of land. He also devised to his wife sundry other tracts of land during her life, and bequeathed to her sundry slaves, and other personal property, and manumitted some of his slaves. He also provided that should his wife be pregnant at his death, and have issue by him, he devised to such issue, and to the heirs of such issue, all the lands he had given to his wife during her life, at her death. He also bequeathed to such issue a legacy; and in case his wife should have no issue by him, then he devised the same lands to his sister *E. Simmons*, in tail, remainder to his half brother *L. Massey* in fee. He also devised other lands to his said half brother in tail, remainder to his son-in-law *J. Massey*, in tail, upon condition he convey to his sister *A. Massey*, in fee simple, all lands which descended to him from his father; and if he should not, he then devised the said lands to the said *A. Massey* in tail male. He also devised other lands to his said daughter in law *A. Massey*, in fee simple. All the rest and residue of his estate, both real and personal, he devised to his half brother *L. Massey*. The defendant then gave in evidence, that a caveat had been, before that time, filed in the orphans court of *Queen Anne's* county to the said paper, upon a full hearing of which it had been adjudged and determined by the said orphans court, that the said will had been impliedly revoked, and that it could not be admitted to probate as the last will and testament of the said *Hemsley Massey*. And the defendant further gave in evidence, that an appeal was prayed and granted from the judgment of the orphans court to the court of chancery, in which last court the judgment of the orphans court was in all things affirmed; whereupon the defendant objected to the admissibility of the said paper, purporting to be the last will and testament of the said *Hemsley Massey*, as evidence of title in this cause; and objected to any evidence being given of the execution of said paper. But the court overruled the objection, and permitted the plaintiff to prove the execution of the paper. The defendant excepted.

5. The plaintiff having, under the direction and permission of the court, read in evidence the aforegoing paper purporting to be the last will and testament of *Hemsley Massey*, the defendant then offered to prove by competent witnesses, that the said *Hemsley Massey* had frequently declared, and on the day before his death, and some time after the execution of the said paper, that he had made a will, and believed he had destroyed it; that as he could not find it he supposed he must have destroyed it, but was uneasy about it, as he intended and wished to alter it, and

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requested the witnesses to go to his house for that purpose. But the court would not suffer this evidence to be given to the jury. The defendant excepted.

6. The defendant having given evidence that *Hemsley Massey* was a married man at the time of making his will, and that he had two children born after the will, namely *Emily Ann*, born on the 7th of January 1805, and *Sarah Ann*, born on the 30th of June 1807, moved the court to instruct the jury, that if they should be of opinion the said children were born at the times before mentioned, and after making the will aforesaid, that in such case the will was revoked in point of law. The plaintiff then gave evidence, that the said *Hemsley Massey*, on the 27th of July 1804, acquired by purchase 399½ acres of land, and on the 26th of August 1805, acquired in like manner 76 acres of land, of which he died seized, and that the said lands are situate in *Queen Anne's* county, as appear by copies of conveyances for the said lands produced and read in evidence. But the court refused to give the direction and instruction to the jury as moved by the defendant, but instructed the jury, that the will was in full force, and as such admissible in evidence. The defendant excepted.

Verdict—"That the defendant is guilty of the trespass and ejectment aforesaid, of and in all that part of the tract or parcel of land in the declaration aforesaid mentioned, included in a deed from *James Massey, senior*, to *James Massey, junior*, dated the 14th of May 1793, and also of and in one half of the tracts of land in the declaration aforesaid mentioned, contained in the deeds from *Philip Reed* and *Daniel Toes Massey*, to *Hemsley Massey*, dated the 17th of August 1801, which said deeds are now affiled in the office in manner and form aforesaid, and are in the words and figures as follows, to wit: THIS INDENTURE," &c. "as the plaintiff complains," &c. *Judgment* upon the verdict for the plaintiff, "for his term yet to come and unexpired of, in and unto, all those parts of the tracts or parcels of land aforesaid particularly specified in the verdict aforesaid, lying and being in the county aforesaid, with the appertenances thereunto belonging, so as aforesaid by the jurors in form aforesaid found," and that the plaintiff have thereof his possession against the defendant, &c. The plaintiff and defendant both appealed to this court.

The cause was argued on both appeals before BUCHANAN, NICHOLSON, and MARTIN, J.

Bullitt and *Chambers*, for the Appellant, *(E. Massey)*. The *three first* bills of exceptions were taken by the plaintiff below, and the *three last* by the defendant.

On the *fourth* bill of exceptions. By the act of February 1777, *ch.* 8, *s.* 12, a will is to be proved where the party had dwelt, &c. They contended, that the will being once

proved, a copy was evidence, which showed that the orphans court had the exclusive jurisdiction on the subject. They also referred to the act of 1798, *ch.* 101, *sub ch.* 2, *s.* 4 to 12, and insisted that the decision of the orphans court, and court of chancery, was conclusive, both under that act, and upon general principles. The commissary general had the right to take probate of wills of land ever since the act of 1715, *ch.* 39, *s.* 2, which right was secured to the orphans court by the act of February 1777, *ch.* 8, giving them all the jurisdiction and authority formerly vested in the county court. An appeal was given by the acts of 1715, *ch.* 39, *s.* 27, and 1726, *ch.* 9, *s.* 2, from the decision of the commissary general to the governor or a court of delegates.

On the *fifth* and *sixth* bills of exceptions. They contended that the birth of children after the date of a will, where the testator has none before, operates to revoke it. They referred to *Wellington vs. Wellington*, 4 *Burr.* 2171, *(and notes.)* *Lugg vs. Lugg*, 1 *Ld. Raym.* 441. *Brady vs. Cubit*, 1 *Dougl.* 31, 38. *Overbury vs. Overbury*, 2 *Shower*, 242. *Lancashire vs. Lancashire*, 5 *T. R.* 49. *Onyons vs. Tryers*, *Finch*, 459. *Gibbons vs. Caunt*, 4 *Ves.* 840, 848; *and* 2 *Fonbl.* 351.

On the *first* bill of exceptions they referred to 4 *Com. Dig.* 409, 412. *Rattle vs. Popham*, 2 *Stra.* 992, to show that powers were to be strictly executed.

Martin, and *Carmichael*, for *Massey's* Lessee. On the *fourth* bill of exceptions. Although a will of lands may have been proved in the ecclesiastical court, it must be proved in the court of common law also. *Netter vs Brett*, *Cro. Car.* 395. *Pow. on Dev.* 688, 689, 703. Act of 1715, *ch.* 39, s. 2. The act of 1798, *ch.* 101, as far as relates to a caveat and appeal to the court of chancery, concerns wills of personal property only. They have nothing to do with the probate of a will of real estate *only*. The Lord Chancellor will require *all* the attesting witnesses, if living, to prove a will, when it is the subject matter of contest in his court. *Rob. on Wills*, 187.

On the *fifth* and *sixth* bills of exceptions. By the statute of frauds, (29 *Car.* II, *ch.* 3,) wills of personal property shall not be revoked by word of mouth only, *a fortiori*, nor wills of real estate. Words therefore are not to be received as evidence of an implied revocation. The statute is positive, that a will of real estate shall only be revoked by a writing, cancelling, &c. *Selwin vs. Browne*, *Cas. temp. Talb.* 240. *Rob. on Frauds*, 77. *Doe vs. Allen*, 8 *T. R.* 147. They also contended, that the revocation of a will had never been implied on the mere ground of the birth of children. 2 *Fonbl.* 351, 353, *(note* b.)

On the *first* bill of exceptions. Where a trustee does that which by law he might have been compelled to do, and which the chancellor would have ordered him to do, it must be intended to have been rightfully done. A trus-

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tee under a will may sell or mortgage. *Bath vs. Bradford*, 2 *Ves.* 588. A devise of lands to A and B, in trust for others in tail and in fee, is a devise in fee to the trustees, though there be not the words *heirs* or *for ever*. *Shaw vs. Weigh*, 2 *Str.* 798.

On the *second* bill of exceptions. They contended that the estate vested in the purchaser immediately on the sale and payment of the purchase money. *Pow. on Dev.* 292.

On the *third* bill of exceptions. They referred to *The State vs. Levy*, 3 *Harr. & M'Hen.* 591.

THE COURT dissented from the opinion of the court below contained in the *first* bill of exceptions, but concurred with that court in the opinion in all the other bills of exceptions.

NICHOLSON, J. dissented from the opinion of this court upon the *first* and *fourth* bills of exceptions.

JUDGMENTS AFFIRMED.

MAY (E. S.) THE STATE, use of CHAMBERLAINE'S EX'RS. vs. WRIGHT.

By an order of the orphans court in August 1797 the executrix of C S was directed to deliver to S W, one of her sureties in the testamentary bond, all such part of the estate of the testator as remained in her hands. S W entered into bond to the state, dated in September 1797, reciting the order, and conditioned that he should deliver and pay all the goods, &c. which should come to his possession by virtue or under the order, or the value thereof, agreeably to law, "to such person or persons as have right to demand the same, when he shall be thereto legally required," &c. An action of debt was brought on this bond in September 1811, at the instance of one of the creditors of the deceased testator, against one of the sureties therein, who pleaded general performance, and the acts of limitations of 1729, *ch* 24, and 1715, *ch* 23—*Held*, that a creditor was not entitled to have the bond sued; as S W could not pay the debts of the deceased, nor recover debts, nor pay legacies, nor settle an account in the orphans court. That he may be likened to one who has letters *ad colligendum*. That he was liable to the administrator *de bonis non*, (the executrix being dead) if one was appointed; and if none appointed, to nobody

Held also, that the bond above mentioned executed by S W, on which the action was brought, was the *thing in action*, and not the judgment mentioned in the replication obtained by the creditor against the executrix of C S in 1803; and that the act of limitations was a bar to the action.

APPEAL from *Queen Anne's* County Court. An action of *debt* was instituted on the 27th of September 1811. upon a writing obligatory, bearing date the 28th of September 1797, and executed to the state, by a certain *Samuel T. Wright*, *Philemon C. Blake*, and *Thomas Wright*, (the defendant and now appellee,) reciting, that "whereas *Cornelia Southeren*, (late *Cornelia Sewell*,) executrix of the last will and testament of *Clement Sewell*, late of *Queen Anne's* county, deceased, neglected to counter-secure *Samuel T. Wright*, one of her securities on her administration of the said estate, pursuant to an order of the orphans court of said county for that purpose; and whereas the said *Samuel T. Wright* is about to possess himself of the said estate by virtue of process to be obtained from the said court. Now the condition of the above obligation is such, that if the above bounden *Samuel T. Wright*, his heirs, &c. do and shall well and truly deliver and pay all the goods, and chattels, and credits, which shall come to his or their possession by virtue or under such process, or the value thereof, agreeably to the laws of the state of *Maryland*, to such person or persons as have right to demand the same, when he or they shall be thereto legally required, then," &c. The defendant pleaded *general performance*. He also pleaded, (in two different ways,) the 21st *section* of the act of *July* session 1729, *ch.* 24, which en-

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acts, "that all actions upon administration and testamentary bonds, shall be commenced within twelve years after the passing of the said bonds, and not after." And he also pleaded the *sixth* section of the act of *April* session 1715, *ch.* 23, entitled, "An act for limitation of certain actions, for avoiding suits at law." The plaintiff replied *non performance* to the *first* plea, and assigned the recovery of a judgment in the general court for the *eastern shore* at September term 1803, in the name of the state, at the instance and for the use of *Thomas Chamberlaine's* executors, against *Cornelia Sewell* executrix of *Clement Sewell*; that a writ of *fieri facias* issued on the said judgment, and was returned by the sheriff *nulla bona*. That on the 13th of August 1804, an action was instituted against *Samuel T. Wright*, one of the securities of *Cornelia Sewell* in the testamentary bond, executed on the estate of *Clement Sewell*, and at May term 1810 a judgment by confession was entered against *Samuel T. Wright* in that action. That at the time of the rendition of the last mentioned judgment, *S. T. Wright*, in virtue of and under the process of the orphans court of *Queen Anne's* county, in pursuance of the order made by the orphans court, had possessed himself of the goods, chattels and credits, which were of *Clement Sewell* at the time of his death, to the value of the debt, &c. which *S. T. Wright* ought to have delivered and paid over unto the said state in satisfaction of the said debt, &c. *Breach*, that *S. T. Wright* hath not paid or delivered over to the state the said goods, &c. or the value thereof, in satisfaction of the debt, &c. There were *special demurrers* to the *second* and *third* pleas, and the causes assigned were, "that it does not appear by the plea that the said writing obligatory, upon which the action is instituted, is in any way included or contained within any of the provisions of the act of July 1729." To the *fourth* plea the plaintiff replied, that the writing obligatory, upon which the action is brought, was executed on the 28th of September 1797, by *S. T. Wright*, and one *P. C. Blake*, and the defendant; that before the debt, or any part thereof, which arose by and upon the said writing obligatory, had been twelve years standing, and within twelve years after the cause of action in the declaration by and upon the writing aforesaid arose and accrued, to wit, on the 2d day of September 1794, an action of debt was instituted in the name of the state, at the instance and for the use of *Thomas Chamberlaine's* executors against *Clement Sewell*, one of the securities of *Samuel Earle*, on the testamentary bond executed on the 24th of March 1788, on the estate of *Richard T. Earle*, for the recovery of the amount of a judgment obtained in the general court at April term 1789, in the name of *Samuel Chamberlaine*, and *Robert Lloyd Nicols* and *wife*, surviving obligees of *James Lloyd Chamberlaine*, for the use of *Thomas Chamberlaine*, against *Samuel Earle*, executor of *Richard T. Earle*. That during the pendency of that action against

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Clement Sewell, he died, and *Cornelia Sewell*, his executrix, was summoned and made defendant, and a judgment rendered against her at September term 1803, upon which a *fieri facias* issued, and was returned *nulla bona*. That afterwards, on the 18th of August 1804, an action of debt was instituted in the name of the state, at the instance aforesaid, against *S. T. Wright*, one of the securities of *Cornelia Sewell*, in the testamentary bond executed by her as executrix of *Clement Sewell*, and judgment thereon rendered in *Queen Anne's* county court at May term 1810. *Verification*, that the debt or thing in action was not above twelve years standing at the time of suing out of the original writ in this cause. The defendant in his *rejoinder* to the *first replication*, stated, that after *S. T. Wright* possessed himself of the goods, &c. which were of *Clement Sewell*, under and by virtue of the order and process of the orphans court, to wit, on the 31st of December 1799, the orphans court revoked the letters testamentary which had been granted to *Cornelia Sewell*, and committed to *S. T. Wright*, in due form of law, administration *de bonis non*, with the will annexed, of all and singular the goods, &c. of *Clement Sewell*, unadministered by *Cornelia Sewell*. That the goods, &c. of *Clement Sewell*, which *S. T. Wright* possessed himself of under and by virtue of the order and process aforesaid, were of the goods, &c. of *Clement Sewell*, which were unadministered by *Cornelia Sewell*, and as such were assets by *S. T. Wright* to be administered. He joined in the demurrers to the *second* and *third* pleas. In his *rejoinder* to the *fourth replication*, he stated, that the state had a good cause of action on the said writing obligatory on the 29th day of September 1798, and might then have sued for the said debt, &c. and that the debt or thing in action in the said writing obligatory, and the condition thereof mentioned, had been twelve years standing before the issuing of the original writ in this cause. The plaintiff, in the *surrejoinder* to the *first rejoinder* stated, that under the order of the orphans court goods, &c. unadministered by *Cornelia Sewell* to a very large amount, to wit, &c. were delivered over and came to the hands and possession of *S. T. Wright*; and although the letters testamentary of *Cornelia Sewell* were afterwards revoked, and letters of administration *de bonis non*, with the will annexed, were committed to *S. T. Wright*, there only remained in the hands and possession of *S. T. Wright*, at the time of granting the letters of administration, goods, &c. to a small amount, to wit. &c. and the rest of the goods, &c. to a large amount, and more than sufficient to pay the debt, &c. had been wasted, disposed of, and misapplied. The *surrejoinder* to the *fourth replication* stated, that the debt or thing in action in the said writing, &c. and for the recovery of which this action is prosecuted, had not been twelve years standing before the issuing of the original writ in this cause. Issue joined. The defendant in his *rebutter* to the *first surrejoinder* pleaded, that under and

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by virtue of the order and process of the orphans court, the goods, &c. to the amount of, &c. were not delivered over, and did not come into the hands and possession of *S. T. Wright*; but that so much thereof as *S. T. Wright* did receive under and by virtue of the order and process aforesaid, remained in his hands and possession at the time of revoking the letters testamentary of *Cornelia Sewell*, and granting the letters of administration, &c. which were insufficient to pay the debt, &c, and were not wasted, disposed of and misapplied, &c. Issue joined. The county court ruled good the *demurrers* to the *second* and *third* pleas.

1. The plaintiff at the trial, to support the *first issue* joined, read in evidence a copy of the order and decree of the orphans court of *Queen Anne's* county, made on the 8th of August 1797, directing "that *John Southeren*, and *Cornelia* his wife, who is the executrix of the last will and testament of *Clement Sewell*, late of *Queen Anne's* county, deceased, deliver into the hands of *Samuel T. Wright*, one of her securities, for the due administration of the estate of the said *Clement Sewell*, all such part of the said estate which shall be remaining in her hands." And, for the purpose of proving that *S. T. Wright* received a large sum of money of the estate of *Clement Sewell* from one *John S. Blake*, the plaintiff read in evidence a record of a judgment, *fieri facias*, and return made by the sheriff, obtained, sued out and returned, in the name of *Cornelia Sewell*, executrix of *Clement*, for the use of *S. T. Wright*, against the said *Blake*; by which record it appeared that judgment was obtained in the said action in the general court at April term 1796, *fieri facias's* issued, and to October 1798 one was returned, laid on certain lands, which were unsold for want of buyers; a *venditioni exponas* issued to April term 1799, and returned by the sheriff, sold, and the money ready, &c. but which was ordered to be *quashed*, and a new *fieri facias* afterwards issued to September term 1799, and was returned by the sheriff "*satisfied plaintiff, says Sheriff.*" The plaintiff also offered evidence by the Hon. *Richard T. Earle*, that he was counsel for *Cornelia Sewell*, and prosecuted the above suit to final judgment, and that he was also counsel for *John Southeren*, and *Cornelia* his wife, after their marriage; that after *S. T. Wright* obtained the aforesaid order, he took upon himself the collection of the money due on the said judgment; that a *fieri facias* was laid on the lands of *John S. Blake*, returnable to April term 1799, which was quashed for irregularity; that another *fieri facias* was laid on *Blake's* lands, returnable to September term 1799. That the sheriff was about selling the lands, and met at *Centreville* for the purpose, when a stop was put to the proceedings in consequence, as he understood, of an arrangement made to pay the money in *Baltimore*. He does not positively know that the money was paid to *Samuel T. Wright* on the judgment

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aforesaid; but that after *Samuel T. Wright* obtained the order from the orphans court, the witness became counsel for *John S. Blake*, and was concerned in setting aside the first execution; that he remained counsel for *Blake* till the time of his death, which happened in the year 1803; and that he never heard of any claim being made on *Blake* by *S. T. Wright*, or any other person, on account of the said judgment. That *Blake* was, before the year 1799, a man of large fortune, and remained so till the time of his death. The defendant then offered evidence, that by the order of the orphans court the letters testamentary of *Cornelia Sewell* were revoked on the 14th of August 1799, and that letters of administration *de bonis non*, with the will annexed, was granted to *S. T. Wright* on the 31st of December 1799. The defendant then prayed the court to instruct the jury, that if they believed that *S. T. Wright*, the principal in the bond on which this suit was brought, was, on the 31st of December 1799, appointed administrator *de bonis non*, with a copy of the will annexed, of *Clement Sewell*, that then they cannot from the evidence offered in this cause, find for the plaintiff on the first issue joined; but must find for the defendant on the said issue. This instruction the Court, [*Purnell* and *Worrell* A. J.] gave. The plaintiff excepted.

2. The plaintiff, to support the aforesaid *first issue* joined, and to prove that *Cornelia Sewell* was ordered by the orphans court of *Queen Anne's* county to counter-secure *S. T. Wright*, who was one of the securities of *Cornelia* on the testamentary bond given by her as executrix of *Clement Sewell;* and that in consequence of her not giving him such counter-security, the said court ordered and decreed, that she should deliver over to *S. T. Wright* all the goods, &c. of the said *Clement*, by her unadministered, read in evidence the said order and decree of the orphans court. And the plaintiff then further offered evidence to prove, that afterwards *S. T. Wright*, by virtue of the said order of the orphans court, did receive the sum of £1736 current money of the goods, &c. which were of the said *Clement*, &c and that he did not, on his being appointed administrator *de bonis non*, &c. or at any time after, return to the orphans court any inventory charging himself as administrator, &c. with the said sum of money, or any part thereof. And also offered in evidence the letters of administration, &c. to *S. T. Wright*, dated the 31st of December 1799. The plaintiff then prayed the court to direct the jury, that if from the evidence so offered they found that *S. T. Wright* did, under and by virtue of the said order of the orphans court, receive the said sum of money of the goods, &c. which were of the said *Clement*, &c. and had before he was appointed administrator, &c. wasted the same, and was not possessed thereof at the time of his being so appointed, that then the plaintiff is entitled to a verdict upon the said first issue. But the court refused to give this direction, being of

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opinion, that if *S. T. Wright* had received the property of the said *Clement*, under the said order and decree of the orphans court, and had wasted the same before he was appointed administrator, &c. yet in consequence of his being so appointed, and receiving letters *de bonis non*, &c. the plaintiff could not support the first issue joined in this cause. The plaintiff excepted.

3. The plaintiff then, to support the *second issue* joined, read in evidence a record of a judgment obtained in the general court at September term 1803, in the name of the state, at the instance and for the use of *Thomas Chamberlaine's* executors, against *Cornelia Sewell*, executrix of *Clement;* and also a record of a judgment obtained in *Queen-Anne's* county court at May term 1810, in the name of the state, at the instance and for the use of *T. Chamberlaine's* executors, against *Samuel T. Wright*; which said judgments are set forth in the pleadings herein before stated. The defendant then prayed the court to instruct the jury, that the evidence in this cause is not sufficient to support the *second issue* in fact joined; and the court gave the instruction. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this court.

The cause was argued before BUCHANAN, NICHOLSON, JOHNSON, and MARTIN, J.

Martin and *Carmichael*, for the Appellant, on the *first* bill of exceptions, contended, that *Wright* was liable under his bond of September 1797, for all monies received under the order of the orphans court. They further contended, that even admitting that after the letters of administration *de bonis non* were granted to *Wright*, he was to be considered as then in possession of the property as administrator, and not by virtue of his bond of 1797, yet as the defendant had taken issue on the fact whether between the date of the bond in 1797, and his letters of administration *de bonis non*, he had wasted the property received by him under his said bond, the question of the liability under that bond, after the issuing of those letters, could not properly arise. That question could only have arisen by the defendant's demurring to the allegation of a *devastavit* by *Wright*, before the date of his letters. They referred to the acts of 1729, *ch.* 24, *s.* 23, and 1734, *ch.* 17, and *Quimby vs. Wroth*, 3 *Harr. & Johns.* 249.

On the *third* bill of exceptions. The defendant relied on the fact, that the debt, if it existed, did not exist more than twelve years, and the issue was joined on this fact. It is objected—1. That the act of 1715, *ch.* 23, does not extend to such bonds; and 2. Twelve years had not elapsed before the institution of the suit. 1. No bond taken in the name of the state was barred by the act of 1715, *ch.* 23, *s.* 6. The word *or* cannot be construed *and*. If so construed, then bonds in the name of the king would be barred, unless they were also for the use of the king. All bonds

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in the name of an individual would be excluded, although for the use of the king. Bonds in the name of the king are not barred because the public are interested. Testamentary bonds were given to the commissary general in 1715. This bond is taken in the name of the state, and the state is barred by no time, except where provision is specially made by statute. 2. Was the debt or thing in action above twelve years standing? There was no debt due from *Sewell's* estate until the judgment against his executrix in 1803, and of course there was no cause of action in this case upon which limitations could attach. A cause of action existed before the judgment, but the debt was not due. No judgment could have been obtained unless the debt was due when the suit was brought. The liability was on the misapplication of the assets by *Earle*. When *Wright's* bond was given in 1797, a suit was then depending against *Sewell's* executrix, and that bond could not be sued without nonsuiting the action against her. They referred, on these two points, to *Esp. Dig.* 151, 226. *Johnson vs. Smith*, 2 *Burr.* 950. *Trueman vs. Fenton*, *Cowp.* 548. Stat. 32 *Hen.* VIII, *ch.* 2, *s.* 4. *Foster's* case, 8 *Coke*, 65.

Bullitt, *Chambers*, and *Harrison*, for the Appellee. On the *first* bill of exceptions. There is no evidence to charge *Wright* with *Blake's* judgment. It has been contended that no issue ought to have been joined on the allegation of *devastavit*, that the defendant ought to have demurred. As the plaintiff made the allegation, the defendant had a right to join issue on it. He might have demurred, but he was not compelled. The case of *Quimby vs. Wroth* was, whether the possession was adverse or not, and the court received the declarations of the party to show it was not adverse. There is no bond required by the act of 1729, *ch.* 24; but the act of 1734, *ch.* 17, demands the bond, and prescribes the condition, in which the obligor is only bound to deliver *goods and chattels*, not *rights and credits*, as stipulated in the bond given in this case. If then *Wright* did receive the amount of *Blake's* judgment, yet the condition of the bond cannot legally embrace it. Where the statute prescribes the form of a bond it must be pursued. 6 *Bac Ab* tit. *Statute*, (H) 379, cites *Slawney's* case, *Hob.* 83. *The Proprietary vs. Jordan*, 3 *Harr. & M'Hen.* 179. *Downes vs. The State, use of Tilden*, 3 *Harr. & Johns.* 239. When *Wright* was appointed administrator *de bonis non*, he was the person to receive the whole funds, and as administrator he was to hold the property he received under the order of 1797, and therefore the bond he gave under that order could not be sued; and if between that order and the granting letters of administration to him, he wasted the property, yet his sureties under that order are discharged. 3 *Bac. Ab.* tit. *Executors*, &c. (H) 58. There is nothing to show that *Wright* had not the

money he received from *Blake*, when the letters of administration were obtained by him.

On the *second* bill of exceptions. Under the act of 1729, there is no authority given to the creditor to support an action against the property delivered—the security was to hold it; and when the letters were revoked, and letters *de bonis non* were granted, the administrator was to receive the property. He could only sue the bond given under the order in 1797. The act of 1734 only required other security. Under the order for the delivery of the property, the property so delivered was to be *valued*. There was no list of debts directed to be made. *Rights* and *credits* were not embraced. Where a bond is given by two obligors, and the obligee dies, having appointed one of them his executor, both are discharged at law. *Cheetham vs. Ward*, 1 *Bos. & Pull.* 630. Where a personal action is once suspended it is gone for ever. *Carey vs. Goodinge*, 3 *Brown's Chan. Rep.* 110. *Berry vs. Usher*, 11 *Ves.* 87. Where a man is to be the party suing and the party sued, the law will intend that to be done which the party defendant might have been compelled to do. *Wright* was bound to pay and account for all he received under the order of 1797, whether wasted or not, before letters *de bonis non* were granted to him. If then *Wright* wasted the property, he was a debtor to the amount, and when he was appointed administrator *de bonis non*, that amount became assets in his hands, and discharged the bond of 1797. The sureties of an executor are discharged on the executor being appointed guardian. He is liable for the amount as guardian. *The Proprietary vs. Jordan*, 3 *Harr. & M'Hen* 179.

On the *third* bill of exceptions. When did the cause of action accrue? Is the *bond* the "thing in action," or the judgment which it is sued to recover? *Sewell* was liable in 1784, as the surety of *Earle*; and although an action was brought against the executrix of *Sewell*, yet it need not to have been brought. The plaintiff might have brought the suit on *Wright's* bond. If *Sewell's* executrix had paid the judgment before a judgment was obtained against her, it would have been allowed to her in the settlement of the estate, because her testator was bound to pay. There was an apparent insolvency of the estate of *Sewell*, and therefore no judgment was necessary against the executrix. Her testamentary bond might have been sued under the act of 1720, *ch.* 24, *s.* 2. The act of 1715, ch. 23, extends to all bonds in language in which the state is interested. The word *or* shall be read *and*. *Fowler vs. Padgett*, 7 *T. R.* 509; yet doubts arise whether that act takes in administration and testamentary bonds—the act of 1729, *ch* 42, includes them. If the bond in question is not an administration bond, then the act of 1715, being general, embraces it. When the property of *Sewell* was delivered to *Wright*, if on the bond he then gave, he was liable to creditors, and his bond was liable, the plaintiff could

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have supported a suit; but if he was only liable as administrator *de bonis non*, then the suit could not be maintained.

Nicholson, J. delivered the opinion of the court. There are in reality but two questions in this case; the one *whether* the bond given by *S. T. Wright*, under the order of the orphans court, for possessing himself of *Sewell's* property, could be sued by a creditor of *Clement Sewell*; and the other on the act of limitations.

The condition of the bond is, that the obligor shall deliver *to the party entitled* the whole property which he shall possess himself of. A creditor is not such a party; for the obligor in the bond cannot pay the debts of the deceased, nor can he recover debts or pay legacies, or settle an account in the orphans court. If not authorised to pay debts, of course he cannot be sued for not paying them. He may be likened to one who has letters *ad colligendum*. The obligor in the bond is liable to the administrator *de bonis non*, if one is appointed; and if none appointed, he is liable to nobody. But it is clear that the commissary general heretofore, and the orphans court now, who have the care of the deceased person's estate, would take the necessary steps for the settlement of the estate by revoking the original letters, granting letters *de bonis non*. No inconvenience, therefore, can ensue from holding the obligor in the bond responsible only to the administrator *de bonis non*.

On the pleas of limitations, the bond executed by *S. T. Wright*, *Thomas Wright* and *P. C. Blake*, on which this suit is brought, is the *thing in action*, and not the judgment against *Sewell's* executrix.

JUDGMENT AFFIRMED.

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TILGHMAN, *et al.* vs. STEUART, *et al.*

A paper purporting to be the last will and testament of D S. wholly in his own hand writing, and having his name written at the beginning, devising and bequeathing both real and personal estate to his brothers, nephews and nieces, &c. leaving blanks for their names, and appointing by names his two brothers and a nephew his executors, leaving also the day, month and year, in blank, with a formal seal affixed, and having the form of an attestation used to wills devising real estate, with three crosses opposite to where witnesses are accustomed to sign their names, was found after the death of D S, in an envelope of white paper, having written on it at the top, in the handwriting of D S, words corresponding with the concluding words of the will, and which appeared to be a part of the draft from which the will was copied, deposited at the bottom of a bundle of certificates of bank stock to a large amount, in a locked trunk, a place of great security, and containing a considerable sum of money, besides many valuable papers, and none but papers of importance. It was proved that D S had always been a man of intelligence and information, and well acquainted with the manner and form of making wills, and also acquainted with the names of his brothers and sisters, and of his nephews and nieces, and with all his family and connexions. That in recent conversations he had said, that he was prepared with a will and had made it a point always to have a will by him. Bank stock had been purchased for him, by his directions, but had not been transferred to him, and it was not mentioned in the will, nor was there any general residuary clause therein by which that stock would pass. The orphans court decreed that this paper be admitted to probate as the will and testament of D S, as to his personal estate. On appeal, *reversed*.

Appeal from a decree of the orphans court of *Anne-Arundel* county, admitting to probate a paper purporting to be the last will of *David Steuart*, of *Doden*. The facts of the case appear to be, that *D. Steuart*, being possessed of a large real and personal estate, died on the 11th of October 1814, having never had but three sisters, all of whom died many years ago, and only one of whom left any children, viz. *Susan*, who intermarried with *James Tilghman*; and having never had but four brothers, viz. *George Hume Steuart*, *Charles Steuart*, *William Steuart*, and *James Steuart*. That *Susan Tilghman*, at the time of

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her death, left *Frisby Tilghman* and *Susan Holliday*, her only children and distributees. That *George Hume Steuart* died many years ago in *Scotland*, in the kingdom of *Great Britain*, leaving by marriage only one daughter, who also died many years ago, leaving by marriage two sons alive, as it is believed, at the death of *David Steuart*. That *Charles Steuart* died many years ago, leaving by marriage four sons alive at the death of *David Steuart*, viz. *George C. Steuart*, *Benedict Steuart*, *Charles Steuart*, and *Edward H. Steuart*, his only children and distributees. That *William Steuart* is still living, never having been married, and that *James Steuart* is also living, having married many years ago, and has now, and has had for several years, two sons, *George H. Steuart*, and *Richard S. Steuart*, and four daughters, *Margaret Steuart*, *Sophia Steuart*, *Henrietta Steuart*, and *Elizabeth Steuart*. That after the death of *David Steuart* a search was made among his papers, in the presence of many of his relatives, for the purpose of finding a will, and after searching in vain in other places, the two persons making the search unlocked a trunk, where the deceased was known to keep his money and most valuable papers, and there found, at the bottom of a bundle of bank certificates of stock, a paper purporting to be his will and testament, neatly and carefully enveloped in a cover of white paper, whereon are written words corresponding with the concluding words of the will and testament inclosed, and which appeared to be a small part of the draft from which the said will and testament was copied. That the trunk was a place of great security, and contained a considerable sum of money, besides many valuable papers, among which was certificates of bank stock to a large amount, and none but papers of importance. The paper thus found, purporting to be the will of the deceased, was lodged in the office of the register of wills for *Anne-Arundel* county, with the envelope of the said paper, on the 20th of October 1814. The paper and envelope are in the following words: "In the name of God, Amen. I *David Steuart* of *Doden*, in *Anne Arundel* county, and state of *Maryland*, being in perfect health, and of sound and disposing mind, do make and publish this my last will and testament, in manner and form following, viz. I give and bequeath unto my brother ———, the dividends of stock of the *Farmers Bank of Maryland*, standing in my name, also the use of my four negroes *Hannah*, *Jeanie*, *Paul* and *Charles*, during his natural life, after which my will is that they should be free; I also leave him my books, plate and furniture, I may be entitled to at my mother's death. *Item.* I bequeath unto my brother ———, the dividends of stock standing in my name in the *Bank of Maryland* and *Bank of Baltimore*. *Item.* I give to my nephew ———, his heirs and assigns, my two tracts of land, the one called *Venture*, the other *Edinbourgh*, lying in the county of *Washington*, also the stock of the *Frederick and Baltimore Turnpike* standing in my

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name, and to each of his children I leave two negro children, a boy and a girl, from four to ten years of age. *Item.* I give to my niece ——— the stock of the *Potomack Bridge Company* standing in my name. *Item.* I give to the sons of my brother ——— any claim I may have against their father's estate. *Item.* To the grand children of my brother ———, I bequeath five thousand dollars each, of which notice will be given by my executors to their guardian. *Item.* I direct that my three farms of *Greenock Park*, *Greenock Farm*, and part of *Obligation*, lying in *Anne Arundel* county, together with the negroes, stock, tobacco and farm utensils, not otherways devised, be sold, and the money applied to the purchase of bank stock, which together with my stock of the *Bank of Maryland*, *Bank of Baltimore*, *Bank of Columbia*, *Bank of Washington*, and the *Farmers Bank of Maryland*, I bequeath to the two sons of my brother ———, they paying to each of their sisters the sum of five thousand dollars. I hereby appoint my two brothers, *William* and *James*, and my nephew *Frisby Tilghman*, executors of this my last will and testament. In testimony whereof I have hereunto set my hand, and affixed my seal this —— day of ———, one thousand eight hundred and ——.

(Seal.)

Signed, sealed, published and declared, by the testator, as and for his last will and testament, in the presence of us, who at his request and in his presence have subscribed our names as witnesses thereto.

Test,

X
X,
X"

On the envelope is thus written to wit: "presence have subscribed our names as witnesses thereto.

Test"

Afterwards, on the 25th of October 1814, this paper was exhibited to the orphans court by *James Steuart*, one of the executors named in the said paper, *George H. Steuart*, son of the said *James*, and *Richard S. Steuart*, *Margaret Steuart*, *Sophia Steuart*, *Henrietta Steuart*, and *Elizabeth Steuart*, also children of the said *James*, appearing by him their guardian, claiming to be legatees and persons beneficially interested in the establishment of the said will, and required that the said will be admitted to probate, and that letters testamentary be thereupon granted to *William Steuart*, *James Steuart*, and *Frisby Tilghman*, the executors therein named: The court ordered that letters of collection be granted to *William Steuart*, *James Steuart* and *Frisby Tilghman*, to preserve the personal estate of the deceased, and continued the case under advisement. At the next term *Frisby Tilghman*, *Susan Holliday*, *William Steuart*, *George C. Steuart*, *Benedict Steuart*, *Charles Steuart*, and *Edward H. Steuart*, appeared and filed a caveat against the said paper being admitted to probate as the

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will of the said *David Steuart*, alleging that it is not his will, but that he died intestate, and praying that the court would not proceed to take the probate of the said paper as the will of the said *David Steuart*, and that letters of administration on his estate might be granted to the parties entitled, and that the parties interested might be summoned. A summons accordingly issued, and the parties were returned summoned, &c. And afterwards *James Steuart*, and others, the respondents, filed their answer to the caveat, alleging that *David Steuart* did not die intestate, as stated in the caveat, but that in his life-time he did make and execute his last will and testament in writing, as appears by the will and testament exhibited, the same being altogether in his own hand-writing, containing a full and entire disposition of his property, and being the only paper purporting to be his last will and testament found at or ince the time of his death, and that he died without having revoked, or any wise altered the said will and testament; therein bequeathing, (among other bequests,) to the respondent *James Steuart*, his brother, a considerable legacy, and to the other respondents, children of the said *James*, by words sufficiently descriptive, and designating them as legatees, other considerable legacies contained in that clause of the will which reads as follows: "*Item.* I direct that my three farms of *Greenock Park*, *Greenock Farm*, and part of *Obligation*, lying in *Anne Arundel* county, together with the negroes," &c. "be sold, and the money applied to the purchase of bank stock, which, together with," &c. "I bequeath to the two sons of my brother ———, they paying to each of their sisters the sum of five thousand dollars." The answer then stated the appointment of executors, the manner in which the will was found, and the names of the several brothers, &c. of the deceased, at the time of his death. That the respondent *James* was the only brother of the deceased who had at the time of his death, and for many years previous thereto, both *sons* and *daughters*, as described and designated in the foregoing clause of his will before quoted and recited. That the will and testament exhibited is a good and sufficient testamentary paper, and was intended as such by the deceased. They therefore prayed that they might be permitted to take the testimony of witnesses for the purpose of establishing the foregoing facts, and in order to prove every other matter and thing necessary for the admission of the said will and testament to probate; and that the court would proceed to admit the said will and testament to probate as before prayed, and that letters testamentary thereon might be granted according to the directions of the will. The testimony of witnesses, and the admission of the parties, proved the manner in which the will was found, and the names of the several brothers, &c. of the deceased, as herein before stated. The paper exhibited as the will of the deceased, was proved to be entirely in the handwriting of the deceas-

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ed. Col. *John F. Mercer*, in a part of his testimony, stated that he "recollects that some years ago, when in the habit of associating frequently with the late *David Steuart*, he has had conversation with the deceased, in which Mr. *Steuart* remarked to him that he was astonished how any man of common prudence or sense could die intestate; that from the time he had had any thing to dispose of, he had made it a point always to have a will by him, or words to that substance, or to that effect." This part of the testimony of Col. *Mercer* was objected to by the caveators, as inadmissible. It was also proved that *Ann Steuart*, the mother of the deceased, died on the 18th of August 1814, and that the deceased died on the 11th of October 1814. *James M'Culloch*, in his testimony, stated, "that he has long known the late *David Steuart*, and lived with him in habits of intimacy to the time of his death. That he had frequent conversations with him respecting wills and the testamentary dispositions of property. That he always and uniformly reprobated the neglect of persons to make their wills. That the deponent had a conversation with him shortly before his death, and after the death of *Ann Steuart*, his mother, which happened six weeks, or thereabouts, before his death. This conversation had no immediate relation to the testamentary dispositions of said *David Steuart*; but he then alluded to the liability of his being cut off, and spoke generally of the propriety and duty of every man being prepared with a will. That whenever the deponent had conversation with the said *David Steuart* on the subject of wills and testamentary dispositions, he always declared that he was prepared with a will, and kept a will by him, or words of that substance and to that effect." A letter was offered in evidence, written by *Frisby Tilghman* to *David Steuart*, dated the 14th of May 1814, and it was admitted, that the writer of that letter had purchased for *David Steuart* 250 shares of stock in the *Conococheague Bank*; that the said purchase was made a few days before the date of the letter, and stood in the name of the said *Tilghman*, and that this letter was the letter advising of the said purchase, which letter was found among the papers of *David Steuart* It was also admitted that *David Steuart* had always been, until his death, a man of intelligence and information, and well acquainted with the manner and form of making wills; and that he was also well acquainted with the names of his brothers and sisters, and his nephews and nieces, and all his family connexions. That *James Steuart* was the only brother of the deceased who had both sons and daughters alive at the death of the deceased, and for many years before. That the words, as written on the envelope or paper inclosing the paper purporting to be the will of *David Steuart*, were written on the top of the inside page of said envelope, (being a half sheet of letter paper,) and that the said words nearly correspond with the concluding words of the paper purporting to be the will of *David Steuart*, written on the third page

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of an entire sheet of letter paper on which that will is written. That the paper purporting to be the will of *David Steuart* is altogether in the hand-writing of the said *Steuart*, as are also the words written on the inside of the envelope. That *David Steuart* generally enjoyed good health until his death, which was sudden. The Orphans Court, [*Mackubin*, Ch. J. *Ridout* and *Maynadier*, J.] *decreed*, that the caveat of the caveators be dismissed, and that the said paper be admitted to probate as the last will and testament of *D. Steuart* as to his personal estate. *Decreed* also, that the respondents recover against the caveators their costs, &c. From this decree the caveators appealed to this court.

The cause was argued at the last term before CHASE, Ch. J. and BUCHANAN, NICHOLSON, JOHNSON, and MARTIN, J.

Martin, *Shaaff* and *Taney*, for the Appellants. There are two grounds of objection to the paper purporting to be the will of *David Steuart* being admitted to probate—1. It appears from the face of the paper that he did not intend it in that state to be his will; and 2. Such a paper had been adjudged not to have validity as a will to pass personal property.

1. The paper has blanks, and no person is named as legatee. There is no signature—no date. It has the formality of a perfect will, and was designed as a will to pass real and personal property, and although found in a place of security, it is obviously an incomplete instrument—merely the draft of a will. He did not intend it as his will, or why omit to insert the names of the legatees? It is admitted he knew the names of all his relations, and that he understood the manner of devising real estate. The form of the attestation to the paper, with the three stars, shows that it was intended to have three witnesses. It is conclusive he did not mean to leave the paper as it stood for his will, for he well knew it would not pass his real estate; and it cannot be supposed that he intended that his real estate should descend differently from what the paper purports it should. It must be a will at the time he wrote it, and no circumstance or after act can give it validity unless he expressly declared it to be his will. This he did not do. Something more, it is evident, was intended to complete it as a will to pass the real estate, which professed to be the intention of the deceased. Some of the blanks may be easily filled from the descriptions given, but the two first cannot be. He had two brothers living at the time of his death, and it is uncertain which brother was meant in either of the two first blanks. Part of the deceased's property was not disposed of; for in May 1814, stock was purchased for him in the *Conococheague Bank*, and it was not mentioned in the paper, nor is there any general residuary clause by which that stock will pass. If he had finally con-

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cluded and meant it as his will, why leave blanks? It is evident he was in doubt, as he well knew the names of all his connexions, and was a man of intelligence. It was a paper which he held under advisement. The envelope shows he had before probably a paper for his will which he had changed. Why not then change the one now produced? It shows he had, upon second thought, abandoned a former draft, and prepared another for consideration.

2. To show that wills like the present have been judged insufficient to pass personal property, they cited and relied on *Mathews vs. Warner*, 4 *Ves.* 186, 197. *(Griffith vs. Griffith, in notes.) Mathews vs. Warner*, 5 *Ves* 23. *Coles vs. Trecothick*, 9 *Ves.* 249. 7 *Bac. Ab.* tit. *Wills & Testaments*, (D 2) 328. 3 *Swinb.* 969, 971. *Rob. on Frauds*, 453; and *Alexander Stewart's* will decided on by this court on the *Eastern Shore*. That case appears to have been this—That after the death of *A. Stewart*, three papers were produced as his will. In the first the names of the devisees in the latter part of the paper were left blank, and supposed to have been written between 1798 and 1800, and not signed, but in the hand-writing of the deceased. The second was written after the spring of 1809, in which there was no bequest inconsistent with the first: and was written in the hand-writing of the deceased, and *A. S.* signed to it. The third was made when the deceased was not capable of making a will. There was proof that the deceased had said five years before, and two months before his death, that he always had a will by him. He informed one witness he had a will by him, but that it was not complete, and he informed another witness, two months before his death, the same thing. The second paper was found in a trunk not locked, with shares of bank stock, in a closet locked, and the key kept by the deceased. The orphans court admitted the will to probate, and on appeal to this court the decree of the orphans court was reversed. As to the respect which is to be paid to the conversations of the testator, they cited *Pemberton vs. Pemberton*, 13 *Ves.* 301.

Pinkney, *Harper* and *Steuart*, for the Appellees. 1. The paper insisted on as a valid will to pass the personal property, is wholly in the hand-writing of the deceased, with his name written at the top, and a formal seal affixed. 2. There is no other paper produced purporting to be his will. 3. The paper produced is full and conclusive in point of form as a will. 4. There is a good appointment of executors. 5. It substantially disposes of the whole property of the deceased. 6. It was found under circumstances of great security. 7. It is not condemned by any evidence in the record.

Although there are many blanks in it, yet it sufficiently designates the legatees, by which it can be known who are meant. The deceased had only two brothers at the time

of his death, and for many years before. The first blank meant *William*. The second meant *James*. The third meant *Frisby Tilghman*, who was the only nephew of the deceased, who had children. The fourth is ambiguous, but it can be ascertained. The fifth, the sons of his brother *Charles* were meant. The sixth meant the grandchildren of his brother *George*, being the only brother who had grand-children. The seventh meant the two sons of his brother *James*, being the only nephews who had sisters. No other brother had sons and daughters. This bequest is clearly made out; and it is contended that it sufficiently designates who are meant as legatees, and if so it is as valid as if their names were inserted. Nothing remains but to see what the testator meant. We must attend to the will itself, and all the circumstances with which it is accompanied. They must be taken all together. It cannot be argued from authorities; we must look for principles. The intention of the testator is only to be regarded. This paper is what the law calls an olograph will, every word of which is in the hand-writing of the testator. It is not like a paper written by another person. This is the first distinguishing feature. The second is his name in the introduction, also written by himself. It is considered as complying with the statute of frauds. Again, the will has been *sealed* by the testator—a formal seal affixed; not a seal made by a pen, but one carefully annexed, and it has been held by Lord *Raymond* and Lord *Holt* that sealing was equal to a signature under the statute of frauds. But this will is not under the statute, so that it is still stronger. There are three great essential qualities to make this a valid will. 1. The seal accompanied with the name, which never could be doubted under the statute of frauds. 2. It contains a good and explicit appointment of executors. 3. It contains a valid disposition of the testator's property. There is no ambiguity in the property devised. But there are blanks for the names of the legatees; yet it will not be denied that if the will was executed, according to the statute, with the blanks left, it would not be rejected because of the blanks. It is admitted that description may stand in the place of a name. If there is a mistake in the name, and the description sufficiently designates who is meant, it will control the name. *Pow. on Dev.* 405. *Abbot vs. Massie*, 3 *Ves.* 148. It has been admitted that the blanks would be of no consequence if the will had been formally executed. Is there any doubt as to the bequests under which the appellee's claim? The blank is as to the name of the brother, not as to the legatees. Nor can there be any doubt as to the other blanks. It is not contended that it is to be taken absolutely as a will of personal property; but *prima facie* to be considered as a testament. That doubts may be raised as to who are meant in the blanks. So it would be the case if it was formally executed. It would not then be permitted to be said that it was not a will. If imperfect upon the face of it, evidence could

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not supply the imperfection. But if simply doubtful, then parol evidence might be admitted to solve the doubt. What is wanting to make this *prima facie* the will of *David Steuart?* Did it want a name? Did it want a seal? Did it want a signature? A will of personal property requires neither name nor signature. It was wholly written by the testator. Was it deficient in the appointment of executors? Did it require publication? None was necessary—no acknowledgment was required. The attesting clause was only required as to the real estate. There is nothing in it which does not make it a valid will as to the personal estate. It may be a will if wholly in blank—the blanks do not vitiate it as a will, if it comes clothed with the forms which the law requires. There can be no inconvenience in admitting such a will to probate. None but those who are shown to have been meant by the descriptions given, can take under the will. It was put in a place of security—the trunk locked, and the key kept by himself. In the trunk were his most valuable papers, and the will placed at the bottom under certificates of bank stock constituting the great mass of his wealth. That the trunk would be examined for his will there could be no doubt. His placing it under the certificates of stock at the bottom of the trunk, shows it was not intended simply as a plan or draft of a will; for if he had so considered it, would he not have put it where instant recourse might be had to it in order to perfect its execution on a sudden indisposition? Having completed it as a will so far as it went, he might have intended to do something further; but as he knew it was not formally executed, it would be a good will as to his personal property only. He knew three witnesses and a publication were necessary to pass the real estate; and he also knew that witnesses and publication were not required as to the personal estate. There can be no doubt then that it is *prima facie* the will of *David Steuart*, and it is incumbent on the appellees to show that it is not *prima facie* his will. It is under the authority of 3 *Swinb.* 971, entitled to be considered as a will, and not a plan for one. Here are no visible imperfections —no interlineations—no breaking off abruptly. The *animus testandi* was existing at the time it was written, and it was deposited in a place of safety. But it has been said that new property was acquired. How new property? One fund converted into another. This did not make it necessary that it should be included in his will. He left this to satisfy the general pecuniary legacies, and to pay his executors their commission. Every thing was done to make it a will of the personal property, and no doubt he did intend to make it operate as a will of his real property also. The court are to attribute the attesting clause to that circumstance. *Matthews vs. Warner*, 4 *Ves.* 200, *(note.)* 1. It does not appear to be a mere plan, but to be a disposition of his property. 2. The evidence fully supplies all doubt. 3. If it is not regarded as a final but only a

formal act intended, it is not material and does not invalidate it The will purports to be a complete disposition, and the evidence is sufficient to make it complete. What are the decisions before the revolution; and how far do those since vary the doctrine? And if they do vary the doctrine how far are they entitled to be regarded? The law, as it existed before the revolution, is the law which now exists in this state. What then is the doctrine of the old cases? *Swinb.* 969, 971. *Limbery vs. Mason*, 2 *Com. Rep.* 451, 452. 454. *Butler & Baker's* case, 3 *Coke*, 31, b. *Dep. Com. Guide*, 78. *The Visitors, &c. vs. Bruce*, 1 *Harr. & M'Hen.* 509. But the authorities referred to by the appellants' counsel, when analyzed, do not impugn the doctrine contended for on the part of the appellees. All the cases go to show that the absence of the signature is of no consequence. *Manby vs. Scott*, 1 *Siderf.* 128. *Stephens vs. Gerrard*, *Ibid* 315. 1 *Swinb.* 80, *(note)*; and *Rob. on Wills*, 198.

Curia adv. vult.

At this term the judges delivered their opinions *seriatim.*

Martin, J. This case is important not only from the amount of property involved in it, but from the principle that will be established by its decision, and unanimity in the opinion of the court would have been a source of great confidence and satisfaction to me. As that, however, unfortunately has not prevailed, I will concisely state some of the reasons upon which I have formed my judgment. This case originated from an application to the orphans court of *Anne Arundel* county, to receive for probate an instrument of writing purporting to be the last will and testament of *David Steuart*, deceased; a caveat was entered by some of the representatives of the deceased to this application, and the orphans court, after receiving the testimony produced by the parties, dismissed the caveat, and admitted the paper to probate, so far as it related to the personal estate.

In an investigation of this kind, the instrument of writing purporting to be a will, is the first object that claims our attention. This instrument professes to dispose of both real and personal estate. It contains seven devises and legacies, leaving a blank in every instance for the name of the devisee or legatee. It has the form of attestation and a seal, but no date, signature or witnesses; and the question for the decision of the court is, whether *David Steuart* intended this paper, in its present imperfect and unfinished state, to operate as his will?

The requisites to constitute a will of real estate are clearly and fully established, and it is much to be regretted that the rules relative to a will of personal property are not equally explicit.

A will to convey lands must be perfect on the face of it, and no defect can be aided or supplied by parol evidence.

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It must not only be intended by the testator as his last will and testament, but must be executed with all the solemnities required by law. The same strictness is not demanded for a will of personal property; but to constitute a good will even for *that* purpose, the paper must either be complete on the face of it, or must be supported by parol evidence. It must appear from circumstances, or the declarations of the deceased, that it was intended to operate as his will in its imperfect and unfinished state. If it be complete on the face of it, it requires no adventitious aid, it is full evidence in itself of the intention of the testator. But if incomplete and unfinished, and other acts are evidently required and intended to be done to give it full authenticity and completion, in my opinion, it cannot be received as a will even of personal property, unless evidence is produced to satisfy the court it was intended to operate as such, in its imperfect and unfinished state. This I conceive is not, as was suggested by the counsel, a novel doctrine, but has been recognized and acknowledged, from the time of *Swinburne* to the present day.

It must be admitted that this paper *in itself* is extremely incomplete as a will—indeed without the aid of parol evidence, it is incomprehensible. Besides the absence of date, witnesses and signature, it makes a disposition of real and personal property, but does not name any person to receive it—conscious of these defects, the testimony of witnesses has been resorted to, to show *David Steuart* intended it as his will in its present state. This testimony then demands our attention. It appears from the record that *David Steuart* possessed a considerable real and personal estate, that he was a man of information, and knew what was necessary to constitute a good will to transmit his property.

Although the particular time when this paper was written does not appear, yet it is evident it must have been before the death of his mother, at least six weeks prior to his own death, and that during that period he was in good health until a very short time before his dissolution. These circumstances I consider all important in the case, because from them the incompletion of the will cannot be attributed to ignorance or sudden calamity.

As this paper contains dispositions of real as well as personal property, it is fair to conclude, *David Steuart* inteaded it should operate equally upon the one as the other, and not that it should be a good will as to the personal, and not the real estate. It is clear that he could not intend it to operate as to his real estate, in its present unfinished form, because from the paper itself it appears that he knew other acts must be done before it could be operative for that purpose—the form of attestation—the three little marks for the witnesses, and the seal, leave no doubt in my mind upon this subject. Is it not equally clear that he intended, before this paper should be his will, other acts should be done to perfect the bequests of personal pro-

perty? How otherwise can you account for the blanks in every instance for the names of the legatees? It is stated that the intended legatees were all his immediate connexions; of course he could be at no loss for their names. If then he had determined this paper should be the ultimate disposition of his property; if there was no *suspended* intention relative to it, why did he not insert those names? The blanks, in my opinion, afford strong evidence that he did not intend this paper, in its present form, to be his will. That he kept it by him as preparatory to a will. An inchoate paper that he could complete at any time, if he should ultimately determine to dispose of his property as therein mentioned. It cannot be denied that the description of a legatee would have the same effect in law as naming him, if the testator *intended* to substitute the description for the name. But the blanks in this case clearly show that *David Steuart* had no such intention; that he did not mean to rely on the description of the legatees, but before the will was completed to fill up the blanks with their names.

But it has been contended that this paper was verbally acknowledged by *David Steuart* as his will, and his conversations with Col. *Mercer* and Mr. *M'Culloch*, have been relied on to prove this position. Col. *Mercer* deposes "that *some years agone*, when in the habit of associating frequently with the late *David Steuart*, he has had conversations with the deceased, in which he remarked to him, "that he was astonished how any man of common prudence or sense could die intestate; that from the time he had any thing to dispose of, he had made it a point always to have a will by him, or words of that substance, or to that effect." Mr. *M'Culloch* states "that he had frequent conversations with the late *David Steuart* respecting wills and the testamentary dispositions of property; that *Steuart* always and uniformly reprobated the neglect of persons to make their wills; that shortly before the death of the said *Steuart*, he alluded to the liability of his being cut off, and spoke generally of the propriety and duty of every man being *prepared* with a will; that he always declared he was *prepared* with a will, and kept a will by him, or words to that effect."

The question arising from this testimony is, whether in those conversations, *David Steuart* intended to apply his declarations specifically to this paper, because if that was not his intention, however prudent they may have been in theory they can have no operation in this cause. It may be observed that the evidence of Col. *Mercer* may be inimical to the will. If the declarations of *David Steuart* to him did not allude to this paper, they can have no effect upon it—If they did allude to it, as the conversations took place *some time since*, it clearly proves that it had been in the possession of *David Steuart* for the period, not merely of six weeks, but of several years, and remaining so long in his possession unfinished, and evidently on the face of it proving that he intended further acts to be done to give it full

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authenticity, it would create a fair presumption in law, that he had abandoned and did not intend to complete it.

But can it be believed that those general declarations of *David Steuart* were intended by him to apply to this paper? The will he had in contemplation, as being such as every man ought to keep by him, was one that would effect the object for which it was intended—would dispose of all the property mentioned in it, and preserve harmony among his representatives. He knew a will to effect that purpose must be executed according to the solemnities of law, and that an unfinished paper, without attestation or signature, could not convey his real estate. If Mr. *Steuart* was under the impression that it was the duty of every man to be *prepared* with a will, can it be presumed he considered himself placed in that situation, by this imperfect paper, which he well knew would not transfer his real property? If, according to his declarations, it was wise and prudent to keep by him such a will as would make a full disposition of his property after his death, it would be the excess of folly, to rely upon a paper of this kind for that purpose, which at all events, leaves the real estate undisposed of, although named in it, and would inevitably involve his representatives in litigation and dispute. The character given of Mr. *Steuart* in this record, forbids such an imputation. He could not therefore intend to apply them to this paper.

It is my opinion, that this paper being incomplete and unfinished on the face of it, evidently requiring other acts to be done to give it full authenticity, and no testimony being adduced sufficient to satisfy my mind that *David Steuart* intended it should be his will in its present form, that it cannot be received as a will even of the personal property—that the decision of the orphans court is erroneous and ought to be reversed.

Johnson, J. The case before the court arises on an appeal from the decision of the orphans court of *Anne-Arundel* county, under which, a paper, purporting to be the last will and testament of *David Steuart*, has been received, and recorded.

The paper in question is written entirely in the handwriting of the deceased, who is admitted to have been an intelligent man, well acquainted with the manner in which wills of real and personal property are to be executed, and who, from the evidence in the cause, lived in good health for several weeks after the existence of the writing in question. There are blanks in every disposition he made of his property, or intended to have made, by the instrument of writing in question. In some instances, the facts stated in the record before the court, reduce to a certainty the object of the testator's bounty; in other instances it is difficult, if not impracticable, consistent with established legal principles, to designate the legatee; there is no date to the will—it was sealed, but not signed by the testator, and on

its face it evidently purports an intention to have been executed, in the presence of subscribing witnesses, in conformity with the provisions of the statute of frauds, so as to have been effectual as well to pass the real, as the personal property described therein; and after the death of the writer, it was found carefully folded up, and lodged in a secure place amongst the deceased's valuable papers.

On the preceding facts, united with the parol declarations of the deceased, and the circumstance that the instrument in question was complete in the designation of the property intended to be given in every instance, except as to the names of the legatees, who in some instances are so described as to remove every particle of doubt, the question arises, Can such an instrument, consistent with the established principles of law, be received as the last will and testament of the deceased?

Against the validity of the will it has been contended, that notwithstanding the ancient decisions may have supported such instruments, the modern determinations establish a different doctrine, and where "the paper in question, on its face, carries evidence of an intention in the framer to perfect it by some further solemnity, which he has died without having superadded, having had afterwards sufficient time and health and recollection to complete it, such paper may be inferred not to have been intended to operate as it stood, and the omission to perfect it may ground a presumption of a change of mind in the deceased." *Roberts on Frauds*, 453.

If the position thus advanced was to be received in its full extent, the consequence would follow, that no will, designed to pass real and personal property, where an intention on its face was manifest that it was designed to have been executed in conformity with the statute, could be effectual to pass the personal property, although signed and sealed by the testator; for as it would be apparent on the face of the paper witnesses were designed to be obtained, the not procuring them would justify, according to the position, the inference of a change of mind on the part of the deceased. To this extent the principle has not been urged in this cause.

But it is contended, that the circumstance of the intended legatees' names having been omitted, united with other facts disclosed in the case, and the time that elapsed after the paper was written, if they do not evince a change of mind, establish a more important point, that the testator never had made up his mind as to whom he would give his property; and that the paper in question never was designed as his will, but was only intended as an instrument, by which, at any moment, he might be able to carry into full effect a more matured mind. In other words, that the instrument in question was not written *animo testandi*.

The objection thus made is extremely plausible; and if nothing else existed in the cause than the paper in question, and the evidence that full time existed for its full

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completion, I should be inclined to think, notwithstanding the careful manner it was placed away, and the other circumstances connected with it, exclusive of Mr. *Steuart's* declarations, that it ought not to be received as a will.

In turning my attention to this case, and examining the principles on which the validity of wills depend, and the obligations they impose on those claiming under them, I have been led to believe cases of this description demand legislative interposition; that persons ought not to be permitted to claim the personal property without a proportionate release of their interest in the real. The only instance in which, connected with a will, that a court of equity cannot give relief, is a *defectively* executed will—and cases of that description frequently call for the interposition of the principle *qui sentent commodum debent sentire et onus*, as those instances to which that principle applies.

Although it seems, nay I may add, is but just, amongst those, who in case of intestacy would inherit the property, that no claim under a will purporting to dispose of the real and personal property should be sustained, yet nothing is more certain, than that the law is otherwise; and as we find it, so are we bound to declare it, and not by establishing a different rule enact a new law. But instances of this kind could never occur in court, or scarcely ever exist in fact, if the will purporting to convey both, could not pass the personal alone; for, perhaps since the statute of frauds, no such will has been written without *disclosing* on its *face* an intention to obtain the requisite formalities.

In forming an opinion in this case, there appears no necessity to introduce adjudications, that *blanks* left for the *name* of the *legatee* will not *defeat* the legacy, provided he is *otherwise sufficiently described*; nor is there any occasion to establish by authorities, that *intended dispositions*, *being void for uncertainty*, will not *defeat those* where that *uncertainty* doth not exist. The opposition to the paper in question rests on different grounds, to wit—He had never made up his mind to give to any person; that the paper in question was not written with an intention to give, but as a draft to enable him to give when his mind was fully made up.

As a will can be valid so far as regards personal property, although it purports a disposition of real, without that passing, even when, on the face of the will, an evident intention is disclosed to execute it with other formalities, it follows, the testator, to pass the personal, need not possess, at the same time, an intention to part with the real; or if such intention exists, and that is defeated for the want of the requisite formalities, the personal dispositions are not defeated.

Having thus premised that a will may be valid as to the *personal*, when void as to the *real*; that they are not *necessarily* void in consequence of *containing blanks*; that *bequests void in themselves for uncertainty* will not affect those to which no such objection exists; and that the *evinc-*

ing, on the face of the will, an intention to have *it executed* in the *presence of witnesses*, will not *defeat* the *personal bequests*, I will add only one other observation before I proceed to consider the paper in question, purporting to be a will, now before the court.

If an intention disclosed on the face of the will to do some other act in *regard to the personal bequests* was to defeat such bequests, on the ground stated of a change of mind in the deceased, or on the foundation that the mind was never made up, then it would appear to me to follow, that no will designed to pass personal property could be effectual where a blank existed; for I must conclude no one can or ever did believe, but that at *the time* the blanks are left, an intention existed to fill them up at some future period. But although all must believe the deceased did intend at the *moment* he *left the blank, at some other time to fill it up, omitting to do so will not defeat the will*, if the object of his bounty is otherwise sufficiently described.

The paper in question was found, as has been before stated, all in the hand-writing of the deceased, an intelligent man, well conversant with the manner of making wills, carefully folded up in a paper, evidently disclosing on its face also to have been the termination of a former instrument, purporting to have been a will, and deposited in a secure place—Yet, as there are such imperfections in the paper in question, if its validity rested here, I should say it ought to be rejected.

Had the paper in question, with all its imperfections on its face, been executed according to the statute of frauds, it seems to have been conceded, (as most undeniably would have been the case) it must have been established; for then the *animus testandi*, as conceded on all sides, would have been disclosed; and yet the objects of his bounty would then have been as uncertain as at present; the formalities of the execution could not have made it more plain, or have removed any of the doubts that now exist, as to those who are to take.

But if the *formal execution* of the will, imperfect as it is, would have established it, then any other act done, or any evidence obtained acknowledging it, in addition to the circumstances connected with the paper in question, must produce the same result; for if the *formal* execution could have established it, then the instrument itself, in consequence of any, or all the blanks, in consequence of any or all the imperfections and uncertainties disclosed on its face, do not of themselves so completely establish the want of the *animus testandi* as to render it void, for if they did, proof of its due execution could not establish it as a will—And, as a will in the hand-writing of the testator is sufficient to pass personal property, and there being proof complete that the paper in question is of that description, it would appear to follow, that subscribing witnesses could give it no additional validity. But if it required any, such

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proof exists in the case; for it is proved by respectable witnesses that the testator to one declared "he made it a point always to have a will by him," and to another, and that after the will in question was written, "that he was prepared with a will and kept a will by him," thereby evidently recognizing the paper, as fully and effectually as if he had produced it to the witness, and acknowledged it as such before him; unless the evidence discloses, or at least raises a doubt, whether he meant by his conversation with the last witness a paper different from the present. The declaration made to the first witness was some years previous to Mr. *Steuart's* decease; but it is more than likely, from the want of evidence that subscribing witnesses were ever called for by the deceased, united with the envelope having been executed similar to the will in question, that he never had executed a testament in conformity with the statute; and therefore, when he spoke of a will, he meant one calculated to pass personal property. From the evidence existing in this case, my judgment is satisfied, that the evidence by the first witness applies to *such* wills, and that the evidence of the other witness relates to the *one* in question, thereby recognizing it, with all its imperfections, as his last will and testament, and that the decision by the orphans court, directing it to be recorded, was correct.

Nicholson, J. Until I came into court this morning, I did not know that it was the intention to deliver opinions in this case *seriatim*, and I had not therefore reduced my opinion to writing. Finding, however, that all my brethren are prepared with written opinions, I will state briefly, that the objections to the paper in question are not that the blanks render it invalid as a will for the uncertainty, but that they manifest an indecision on the part of the testator—they show that at the time of writing, the *voluntas testandi* was not complete. No attempt has been made to assign a reason for leaving the blanks, and as it is admitted that *David Steuart* was acquainted with the names of the alleged objects of his bounty, it would seem necessarily to follow that if he had decided finally, the names would have been inserted where the blanks are now left.

It is true, that if the paper had been executed agreeably to the statute of frauds, the blanks would not have defeated it as a will, although they might have rendered some of the devises inoperative for uncertainty—But it could nevertheless have been a will. The signing, sealing and attestation, would have evidenced the *voluntas testandi*, whimsical as that *voluntas* must appear, which has the complete power of expressing itself, yet leaves itself to be guessed at for years perhaps afterwards. But we are not called on to construe it now. It is our province to say whether it is such a paper as shows a fixed and settled determination of the deceased to make a final disposition of his property. The declarations of *David Steuart* do not aid it. It is impossible that he could have alluded to this

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paper when he said he had a will, &c. for it is admitted that he knew it would not pass his real estate, and knowing this, he could not, consistently with a regard to truth, refer to that which would not prevent the evils which he professed to be desirous of guarding against.

A will of real estate is placed by the statute of frauds on a very different footing from a will of personal estate. In fact they hardly belong to the same class of instruments. A will of real estate is a statutory conveyance; and in order to determine whether it be a will, we are to look only to the *formality* of *execution*. If the *forms* required by the statute have been complied with, we are precluded from saying it was not written *animo testandi* without regarding the nature of its provisions. But in a will of personal estate, having none of those formalities, we must look into the body of the instrument for *substance* more than for *form*. We must search for the *animus testandi*, and that must be collected from a view of the whole subject matter without regard to technical rules; for on such a subject there can be no rule applicable to all cases. In this case all the devises are to persons for whose names blanks are left; and one half of them are not even so described as to enable them to take under a will executed with all the solemnities required by the statute. It does not therefore bespeak to my mind such a fixed and settled determination on the part of the deceased as is all important to constitute a last will and testament, and I concur in the opinion that *David Steuart* died intestate.

Buchanan, J. This is an appeal from a decree of the orphans court of *Anne-Arundel* county, on a caveat by the appellants against a paper, purporting to be the last will and testament of *David Steuart*, deceased, being admitted to probate.

By the decision of that court the caveat was dismissed, and the paper admitted to probate, as the last will and testament of *David Steuart* as to his personal estate. And the question presented to this court is, Whether that paper is the will of *David Steuart?* In the discussion of this cause, most of the adjudged cases, having any analogy to it, have been cited; but it is difficult to decide such questions upon the authority of adjudged cases, for it is in vain to look for cases exactly parallel; they are not to be found—each case depending upon its own particular circumstances. We must, therefore, look, not to the decisions made on the facts arising in reported cases, but for the *principles* governing those decisions. And it seems to have been long well settled, that to constitute a written paper a "last will and testament," it must appear that the deceased possessed *animum testandi* at the time it was written; and that he intended the paper as it stood to be his will, without looking to any thing further to be done in order to perfect it.

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And it is laid down, that if a man leaves an instrument purporting to be a will, which is unfinished, or carries evidence on the face of it of an intention in the framer to have perfected it by some further act, which he has died without doing, having had sufficient time and health to complete it, it shall not be received as his will, but he shall be presumed to have changed his mind.

The first thing to be considered then in this case is, What was the intention of *David Steuart* at the time he wrote the paper before us? And to come at a correct solution of that question, recourse must be had to an examination of the paper itself, which upon the face of it appears to be very imperfect.

No person is named as a legatee or devisee, but every devise is in blank as to the person, some of which cannot be filled up. The two first are of this description; each is a devise to his *brother generally*, without being named, with a blank left for the name; he had two brothers then living, and it is altogether uncertain which of them was meant in either of those devises. It is not signed, and is without date, blanks being left for the month and day of the month, and it is broken off at the end of the words, "one thousand eight hundred and," leaving the particular year of the century to be added. These, perhaps, are not alone circumstances to set aside a paper, if the testator intended it to be his will in that form, without any thing further being done; but they are circumstances to weigh on the mind of a judge in looking for the intention of the party. It is said that a person may take as a legatee or devisee under a will, by description, without being named. But in every such case it would seem that the description must be such as the testator intended to rely upon, without any thing being superadded. In this case, something further seems to have been intended, and the blanks left, afford evidence of that intention. They show that *David Steuart* did not, at the time, intend to rely upon what was *written*, as a description of the persons to take under his will, but left the blanks to be filled up at another time with their respective names, or with some further and more perfect description; Or why were those blanks left? Certainly not of themselves to perform any useful office, since they, as blanks, give no description, nor afford any evidence of who were intended by the deceased. If he had been ignorant of his family, that circumstance might, in some sort, be used to account for his not describing by name those who were intended as the objects of his bounty. But it appears that he was well acquainted with every branch of his family—Why then, if his mind was made up, if he had finally concluded on the manner of disposing of his estate, did he leave blanks so important as those relating to the names of the legatees or devisees, and particularly when some of those blanks cannot be filled up with any degree of certainty by those best acquainted with every member of his family? The same may be said of the blanks in relation to the date—for though a will may be

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good without date, yet in this case, a date is in part set out, and blanks left for the residue; from which it is plain, that if he meant ever to perfect the paper produced. as his last will and testament, he intended to date it at the time it should be so perfected, and left the blanks for that purpose. The absence of the signature of the deceased, at the bottom of the paper, if it were perfect in other respects, would of itself be of no importance, seeing that it is written by himself, with his name set out in the beginning, and a seal annexed. But it is of importance, taken in connexion with the other imperfections apparent on the face of it; the particularity of which imperfections show them not to be mere omissions, or the effect of accident or ignorance, but the result of a deliberate intention, not to complete it at that time, with a view either of filling them up at some other time, when he should perfect that particular instrument as his will, or of keeping the paper itself only as a project of a will, or a draft either for consideration, or as a direction whereby he might readily make his will. There are other circumstances apparent on the face of the paper produced worthy of consideration, which have a strong tendency to show that it was not written *animo testandi* as it then stood, without any thing further being done. The clause of attestation is very formally drawn, to which is superadded the word "Test," and immediately following, three small crosses. Now this was certainly done for some purpose, and as the object could not have been to give effect and efficacy to the paper as it then stood, it would seem as if they were used as memoranda for the government of the deceased, the word "Test" denoting, that when finally executed, it must be subscribed by witnesses, and the crosses directing the number of the witnesses, and the places where their names should be written. The frequent declarations ascribed to the deceased, that he was prepared with a will, and had one by him, cannot be applied to this paper, if he is to be understood as meaning that he had a finished and regularly executed will, but must have related to some other paper; for it is in proof that he was a man of intelligence and information, and well acquainted with the manner and form of making wills, and could not therefore have alluded to this unfinished and imperfect paper, which purports to be a will of both real and personal estate, but which he knew was not such an instrument as would pass real property. And there is nothing in the whole of the evidence to identify this paper as the one spoken of by him. But if he did allude to this paper, he could only have meant that he had a paper which he could at any time perfect as his will, or by which he could make one, and not that it was his will in the form it then bore; and that he generally kept a draft or project of a will by him, which he destroyed according to circumstances, may well be inferred, from the fact, that on the envelope were the concluding words of a clause of attestation in his handwriting, corresponding with the concluding words of the

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clause of attestation, by the paper in question, with the word "Test" also subjoined, evidently the remains of a former draft of a will, to which he may as well be presumed to have alluded, when speaking of having a will by him, as to this paper; and which, together with the paper produced, and the proof that he was in the habit of reprobating the negligence of those who died without wills, very strongly shows that it was not his intention to die intestate as to any part of his property, and that he was solicitous to place his estate by will, in a situation to preclude any controversy amongst his relations. And yet, if he wrote this paper *animo testandi*, and intended it to be his will as it then stood, without doing any thing more to perfect it, he must have known, not only that he would die intestate as to the whole of his real property, which it is evident from the face of the instrument itself, containing devises of his real estate, (which was very considerable,) he did not intend to do, and which no one can believe; but that he would also die intestate as to a large amount in the *Conococheague Bank*, mentioned in the letter of *Frisby Tilghman*, and concerning which no provision is made. And moreover, that the very state of things, which it appears he was solicitous, and which, from the particularity with which he noted the necessity for witnesses, with marks for their number, and the place to be occupied by their names, it is evident he was determined to prevent, would be produced by such an instrument. The paper itself is manifestly an unfinished instrument, intentionally left so by the framer, who died without perfecting it, after having had sufficient time and health to do so; for it appears from the evidence in the cause, that he must have lived in good health, at least six weeks after it was written. It is obvious, therefore, from the whole of the case, that *David Steuart* did not write this paper *animo testandi*; but that he either intended to perfect it by such further solemnities as would render it a valid instrument to pass both his real and personal property, or that it was only written as a draft, or project of a will, for consideration, or to serve him in extremity, and in neither case can the circumstance of his having kept it in a place of security make any difference. And if he did not intend it to be his will as it then stood at the time he wrote it, no man is competent to tell when the *voluntas testandi* did exist in his mind as to that instrument. Applying then to this case the principles before laid down, which appear to run through all the authorities since the time of *Swinburne*, the conclusion seems to be irresistible, that the paper in question is not the will of *David Steuart*.

If I have a doubt on this subject, it is a doubt produced by the much regretted circumstance that two of my brethren, whose opinions are entitled to the first consideration, do not concur with me.

Chase, Ch. J. also delivered his opinion, (which we have not been able to procure,) declaring it to be a good will as

to the personal estate, and that the decree of the orphans court ought to be affirmed.

DECREE REVERSED.

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SMITH, *et al.* vs. GILMOR, *et al.* Garn. of WILLINK, *et al.*

JUNE.

APPEAL from *Baltimore* County Court. In this case an attachment issued on the 2d of February 1805, in the names of the appellants, against the lands, tenements, goods, chattels and credits, of *Wilhem* and *Jan Willink*, in virtue of a warrant from a justice of the peace of *Baltimore* county, directed to the clerk of the county court of that county, accompanied by an affidavit and account, pursuant to the directions of the act of assembly of 1795, *ch.* 56. At the same time the plaintiffs sued out a writ of *capias ad respondendum* against the defendants, and filed a short note, stating that the suit was brought to recover the sum of $14,094 84 due to them from the defendants on account; and a copy of the short note was sent with the said writ, endorsed thereon "to be set up at the court house door by the sheriff." The attachment at the return day was returned by the sheriff, laid in the hands of *Robert Gilmor* and others, (the appellees,) and the writ of *capias ad respondendum* was returned *Tarde*. The garnishees being called appeared, and pleaded *non assumpsit* by *W.* and *J. Willink*, and for themselves *nulla bona*; to the last plea there was the general replication, and issues were joined,

1. At the trial in October 1808, the plaintiffs gave in evidence, that in the year 1801, they dispatched to *Amsterdam* in *Holland*, a ship called *The Union*, belonging to them and destined for a voyage from thence to *Batavia* in the *East Indies*; that *R. Purviance*, junior, was appointed by them supercargo of the said ship, and their agent for the whole voyage, with instructions to apply for assistance and advice in transacting the business to Messrs. *Wilhem* and *Jan Willink* of *Amsterdam*, (the original defendants in this

W, by letter, in answer to an inquiry made of him by P, on what terms bills on *Batavia* to the amount of $30,000, could be had at *Amsterdam*, &c. stated, that "bills on *Batavia* might be purchased to the amount of f.75,000, or $30,000, at 48 per rix dollar of 2 1-2 a piece, and 10 or 12 pr. ct. discount, to be paid immediately" —*Held*, by *Baltimore* county court, that the construction of the answer to the letter was, that an investment of 75,000 florins, *Holland* currency, or $30,000, money of the *U. S.* might be made in bills on *Batavia*, drawn according to the usual course of trade, in rix dollars; that for each rix dollar, for which the bills should be drawn, the purchaser would have to pay 48 stivers, *Holland* currency; and the value of the rix dollar, thus drawn for, was 2 1 2 florins *Holland* currency

That court also *held*, that if W was authorised by P, and undertook to purchase bills according to the terms stated in the above answer, and none other, he was obliged to purchase according to those terms or not to have purchased at all.

That court being divided in opinion, (only two judges present,) refused the defendants' prayer to direct the jury that W was not bound by his undertaking to procure bills which would produce in *Batavia* 30,000 *Spanish* dollars. On appeal—*Held*, that the prayer ought to have been rejected.

That court being divided in opinion, also refused the defendants' prayer to direct the jury, that if P, when he received the bills from W, knew them to be bills on *Batavia* for 30,00 rix dollars, and knew the sum of money for which they had been purchased; and that W, in making that purchase, undertaking of the order, and giving the information on which it was founded, acted fairly and with good faith, and procured the bills on as advantageous terms as they could then have been obtained, then the acceptance of the bills by P was an assent to the purchase. On appeal—*Held*, that the direction asked for ought to have been given.

That court being divided in opinion, also refused the defendant's prayer to direct the jury, that if W, by his letter to P, understood it to mean, that bills on *Batavia* to the amount of 75,000 florins, *Holland* currency, or $30,000, currency of the *U. S.* at 2 1 2 florins to the dollar, might be purchased at the rate of 48 stivers, *Holland* currency, for each rix dollar of *Holland*, in heavy stivers, with a discount of 10 or 12 pr. ct. and intended his letter to be so understood at the time of writing it, then he is not responsible for having purchased the bills at that price. On appea.—*Held*, that the prayer ought to have been rejected.

The defendant having prayed the court to direct the jury on particular points, and the court being divided in opinion, only two judges being present, refused the prayer, to which refusal the plaintiff and defendant both excepted, according to the act of 1778, *ch* 31. On appeal by the plaintiff—*Held*, that he had a right to the benefit of his exception.

A declaration need not be filed in a case against garnishees who appear to, and contest an attachment on warrant, if a short note is filed at the time of issuing the *capias* sued out with the attachment.

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cause,) who were the regular correspondents of the plaintiffs in that place. That the ship and supercargo arrived in *Amsterdam* some time previous to the 29th of July 1801, on which day *Purviance*, wishing to obtain information as to the practicability of placing the value of $30,000, money of the *United States*, in *Batavia*, by means of bills of exchange, and the terms on which those bills could then be obtained in *Amsterdam*, addressed to the Messrs *Willink* on the 29th of July 1801 the following letter: "I want to purchase, if possible, good bills on *Batavia* to the amount of $30,000. What are the lowest terms at which they may be had? I propose paying for them in the following manner:—With the freight of *The Union*, after deducting her disbursements and other charges—With the proceeds of my brother's sugars—With a remittance (which I look for momently) either in a bill, or in sugars, or, should it not arrive in time, with remittances from *Bremen*. Would it be possible to purchase the bills of the *India Company*? If so, would they be payable in produce at the market price, on fixing the prices now? Will the bills be payable in specie, or paper? If the latter, what will be the proportionate value? It will be materially necessary that the bills be drawn at sight." That to this letter the *Willinks* on the same day returned this answer, written in the *English* language, viz. "Bills on *Batavia* might be purchased to the amount of f.75,000 or $30,000 at 48 per rix dollar of 2½ a piece, and 10 or 12 *per cent.* discount, to be paid immediately, with an in case of need, on three, four or five persons, and at last on the governor of *Batavia*, to be paid there at sight, or at a few days, say 4 or 8, sight, to the order of Mr. *R. Purviance* junr. and in case of his death, of Capt. *Porter*, or any one that Mr. *P.* should wish." That after receiving this answer *Purviance* gave orders to the *Willinks* to purchase bills for him accordingly, for the use of the plaintiffs, and of the said voyage, which purchase the *Willinks* undertook to make as agents for the plaintiffs at the usual commission. That in pursuance of this order and undertaking the *Willinks* did purchase for the use of the plaintiffs at the rate and price of 48 stivers to the rix dollar, with a rebatement or discount of 12 *per cent.* good bills on *Batavia* to the amount of 30,000 rix dollars, payable at 4 days sight, which bills were written in the *Dutch* language, and an admitted true translation of one of them, (the others, one for 15,000 and the other for 10,000 rix dollars, being of the same tenor) is as follows, viz. "At *Amsterdam* the 18th of August 1801. For rix ds. 5000. At four days sight please to pay for this first bill of exchange, to the order of Mr. *Rob. Purviance*, junior, and in case of decease, to Cap. *A. Porter* of the ship *Union*, the sum of five thousand rix dollars weighty sts. of forty-eight stivers. Value received from Messrs. *Wilhem* and *Jan. Willink*, and place to account as per advice from

Your Ob. Serv.

(Signed) *J. Temminck & A, H. C. Staringh.*

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To the hon'ble. Messrs. *Neun, Wieze* & *Wiegman*, executors of the estate of the late Mr. *Wiegermen, Batavia.* In case of need to apply to his excellency Mr. *Van Overstraten.*" That the said bills were delivered to *Purviance* at *Amsterdam* on the 18th of August 1801, who at the time when they were presented to him stated to the *Willinks* that he did not understand the *Dutch* language, and therefore wished to have the bills explained to him in the *English* language. Whereupon they delivered to him, instead of a verbal explanation of the bills, the following paper purporting to be a translation of the substance of one of the bills, viz. ..... *Amst.* 18th August 1801.

"At 4 days sight please to pay for this first of exchange, to the order of Mr. *Robert Purviance*, junr. and in case of death, to Capt. *A. Porter* of *The Union*, the sum of —— heavy money, value of Messrs. *W.* & *J. W.* which please to place to account as advised of.

Your most Obed. Serv.

(Signed) *J. Femminick* & *A. H. C. Sharingh.*

"On *Imp. Neun, Wieze, Wiegman*, executors of the estate of the late *Wiegerman*, esquire, deceased. In case of need to his excellency the general *Van Overstraten.*"

And at the same time he was informed by one of the partners of the said house, that two guilders and an half, each guilder being equal to 40 cents current money of the *United States*, was the par exchange between the rix dollar of *Holland* and the rix dollar of *Batavia.* That *Purviance* having read the translation, a receipt for the bills written in the *English* language was presented him by the *Willinks*, viz. "Received from Messrs. *W.* & *J. Willink* three sets of bills of exchange on *Batavia*, to the amount of thirty thousand rix dollars," which he signed and delivered to the *Willinks*, receiving from them at the same time the said bills, being under the impression that they would be paid to him in hard dollars of the value of 2½ guilders *Holland* currency, being the par value of *Spanish* milled dollars. That the ship *Union* on the 19th of August 1801, proceeded on her voyage to *Batavia* with the said supercargo on board, and arrived there on the 7th of February 1802. Soon after which said bills were presented by *Purviance* for acceptance, who then learned for the first time that the bills being drawn in rix dollars were, according to their tenor, payable in the currency of *Batavia*, and would produce no more than $22,000 *United States* currency, and would only be paid at that rate. That finding this to be true, *Purviance* did accordingly receive payment of them at that rate and to that amount, and was thereby disappointed of $7,500 of the funds which he had expected in *Batavia*, and which were necessary for the purposes of completing the cargo of the ship, and in consequence thereof he invested only the said sum of $22,500 in a return cargo for the ship, which was not sufficient to fill her by the deficiency of $7,500, and dispatched her to *Baltimore.* After which he returned to *Amsterdam*, where a correspondence by letters took place between him and the

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Willinks, which letters the plaintiffs gave in evidence. They further gave in evidence that pending the negotiation for the bills, *Purviance* did clearly and explicitly explain to the *Willinks* that it was his desire and intention to contract for and purchase bills to the amount of 30,000 *Spanish* milled dollars; and that this sum was necessary for the purchase in *Batavia* of a return cargo for the ship; that *Purviance* did believe that the *Willinks* so understood him; that in answer to his inquiries as to the value of the rix dollar, as specified in his letter to the *Willinks* of the 29th of July 1801, they assured him that it was 2½ guilders, of a guilder *Holland* currency, to the rix dollar. They further offered in evidence that a florin and a guilder in *Holland* mean the same thing, and are a denomination of money consisting of 20 stivers; that the denomination of florin is not used in *Batavia*, and that the par of exchange between money of the *United States*, and money of *Holland* is 40 cents to the guilder, 2½ of which make a rix dollar of *Holland*. They further read in evidence a letter to them from the *Willinks*, dated the 15th of September 1802 on the subject of the purchase of the said bills for their use, viz. "With respect to the bills we procured to Mr. *Purviance*, we endeavoured to convince him during his last stay here of the impropriety of his claim, on the supposed error in said bills of exchange on *Batavia*. When he asked for $30,000, of f. 2½ each, we answered they could be purchased, but explained to him by mouth accurately that bills on *Batavia* were always drawn in rix dollars at 48 stivers, and obtained a discount more or less as could be agreed on. Whereupon he ordered 30,000 rix d. to be bought, as was duly performed at a discount of 12 *per cent.* At the delivery of the bills drawn in Rx. D. at 48 st. each, he acknowledged their receipt and was fully satisfied with them. If therefore people in *Batavia* had refused to pay 30,000 *Spanish* milled dollars, and he had supposed the drawers committed an error, his duty had called him not to receive any money, but have the bills protested, to sue the drawers in *Amsterdam* on his return; but having received the money, and having parted with the bills, he gave up the whole of his right, if any, and has no title now to form any demand. However, to evince you gentlemen he has not sustained a loss as he seems to suppose, we shall give you as a proof the following statement. Mr. *Purviance* paid for the bills of Rx. D. 30,000 f. 63,360

Deducting ½ p. c. with brokerage	31 14	
And 10 p. c. insurance	6,336	
		6,367 14
		56,992 6

For which sum Mr. *Purviance* could have purchased at 51½ sti. as the price was for *Spanish* dollars $22,130

And he has received in *Batavia* 22,500

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And if we calculate 15 p. c. premium of insurance, as must have been paid at that time, as will appear by the inclosed affidavit, it was a profit of 5 p. c. more. Could thus any man in his senses suppose Mr. *Purviance* would have obtained bills to be paid with 30,000 *Spanish* milled dollars which stood him only at 42⅝, when dollars in specie were paid at 51½ sti.—It is impossible to believe it." And also an account current transmitted to them by the *Willinks* relative to the said purchase viz. "1801, Aug. 20. To furnished bills on *Batavia* to Mr. *Purviance*. Rx. D.

30,000 at 48 st. deduct 12 p. c. discount	63,360	
Our commission on the purchased bills f. 63,360 at 1 p. c.	633	12
Interest of our advance at 5 p. c.	208	12
Postage of letters	4	4
	64,206	8"

The plaintiffs also gave in evidence, that money is never taken up on loan at *Batavia*, by drawing bills on *Holland*, unless the funds taken out in the vessels trading there are sufficient to complete their return cargoes; and that the supercargoes, to enable them to obtain money in that mode, must have a special authority from their owners in *America*, and who must also enjoy a good credit; that no vessels ever sail from *America* under the expectation of being able to obtain funds for the purpose of purchasing their return cargoes; and that it is very uncertain when money may be procured on bills at *Batavia*, and that money cannot at all times be procured on bills. They further offered in evidence, that although the word "*Dollar*" is not known in the *Dutch* language, nor is a coin in *Holland;* yet the word *Dollar* is used there among merchants, and is well known by them as meaning a *Spanish* milled dollar, or the dollar of the *United States*, and that the *Willinks* so understood it. The defendants then gave in evidence, that *W.* and *J. Willink* are natives of *Holland;* that the word *Dollar* is not a word known in the *Dutch* language, or in use among the merchants of *Amsterdam;* that there is no such coin or currency in *Holland* or *Batavia*, as a Dollar; that the rix dollar of *Holland* contains 50 stivers, equal to 2½ guilders and florins, and is worth a dollar *United States* currency; that a rix dollar of *Batavia* contains 48 stivers only, and is worth no more than 75 cents currency of the *United States*, when paid in silver, but when paid in paper money of *Batavia*, is of considerably less value; that when the term rix dollar is used in *Amsterdam* in a bill on *Batavia*, it means a rix dollar of *Batavia* currency, and is payable in the paper money of *Batavia*, unless it be specified in the bill to be "*heavy stivers*," in which case it is payable in silver, and is then worth 75 cents as aforesaid; that this is the usual custom and course of trade in *Amsterdam* relative to the drawing of bills on *Batavia*, where accounts are kept in rix dollars and stivers, 48 stivers to the rix dollar; that *Spanish* milled dollars in *Amsterdam* are, and in eve-

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ry part of the year 1801, and before and since, were an article of merchandize, and not a denomination of money; that as an article of merchandize, its value fluctuates in the market of *Amsterdam*, from 48 to 53 stivers, *Holland* currency, to the *Spanish* dollar; that on the 18th of August, 1801, the market price of a Spanish milled dollar in *Amsterdam*, was 51½ stivers *Holland* currency, and the market price of bills on *Batavia* in rix dollars, payable in heavy stivers, was 48 stivers, *Holland* currency, to the rix dollar of *Batavia*, with a discount or abatement of 12 per cent. being the price at which the *Willinks* purchased the said bills; that the said bills were purchased on the most advantageous terms on which such bills could then be obtained; that the sum paid therefor was 63,360 florins, *Holland* currency, of which *Purviance* was informed at the time when the bills were presented to him by the *Willinks*, and receiv by him as aforesaid; that he at that time knew and was informed that the said bills were for 30,000 rix dollars on *Batavia*, and with that knowledge consented to receive, and did receive them as aforesaid; that in the purchase of the said bills, and in all the preparatory negotiations and arrangements concerning that purchase, the *Willinks* acted fairly and honestly as agents, laid out the money of the plaintiffs to the best advantage, and had no interest whatever in the transaction, except a commission of one per cent for the purchase on the sum invested; that in the previous correspondence between them and *Purviance*, relative to the price and amount of bills to be purchased on *Batavia*, they had no interest or intention to deceive him, or lead him into any error or mistake; and when they purchased and delivered to him the bills in question, supposed that they had fully executed the commission which he had given them. The defendants further offered in evidence, that the insurance of money from *Holland* to *Batavia* was, in and about the year 1801, six *per cent*, which with charges, and the premium, would then have amounted to 7½ p. c. on the sum transported. That the plaintiffs had not at that time any *Spanish* dollars in *Holland*, but must have purchased them; that they resolved to send them to *Batavia*, and must have paid for them at the rate of 51½ stivers *Holland* currency to the dollar; and that money may be, and in February 1802 might have been obtained in *Batavia* for about 15 p. c. premium, by drawing bills on *Amsterdam*, which at that time was a customary mode of raising money there to complete return cargoes to *America*. The defendants further offered evidence to prove, that the information given by the *Willinks* to *Purviance*, relative to the value of the rix dollar of *Batavia*, and the par of exchange between *Holland* and *Batavia*, if given at all, was not given at the time of his receiving from them the bills, but at the time of writing their answer to his letter of the 29th of July 1801, and that no such information was given by them to him. The defendants further offered in evidence, that it is usual in voyages from the *United States* to

Batavia, either direct or by the way of *Europe*, for the supercargoes to be furnished with authority to draw bills in *Batavia* for the purpose of raising money there, to make up their return cargoes; which custom arises from the danger always existing, that the funds carried out may prove deficient. That the supercargoes of houses in the *United States* of established and known credit, and known in *Batavia*, may dispose there of their bills on their employers for the above purposes, and on the usual terms; and that *Purviance*, as the agent of the plaintiffs, might have disposed of bills on them at *Batavia* on the usual terms, for the purposes aforesaid, without any special authority for that purpose from them. The defendants then prayed the opinion to the court, and their direction to the jury, that the true meaning and construction of the letter from the *Willinks* to *Purviance* of the 29th of July 1801, is to inform him, that bills on *Batavia* to the amount of 75,000 florins, *Holland* currency, or $30,000 currency of the *United States*, might be purchased at the rate and price of 48 stivers *Holland* currency for each rix dollar of *Batavia*. But the Court, [*Hollingsworth*, A. J.] was of opinion, and so directed the jury, that the answers of the *Willinks* gave *Purviance* reason to believe, that an investment of 75,000 florins *Holland* currency, or $30,000 money of the *United States*, might be made in bills on *Batavia*, drawn according to the usual course of trade in rix dollars; that for each rix dollar, for which the bills should be drawn, the purchaser would have to pay 48 stivers *Holland* currency; and the value of the rix dollar, thus drawn for, was 2½ florins *Holland* currency. The defendants excepted.

2. The defendants then gave in evidence the above opinion delivered by the court to the jury, and assented to by the plaintiffs. The defendants then prayed the opinion of the court, and their direction to the jury, that the order given by *Purviance* to the *Willinks*, to purchase bills of exchange for the use of the plaintiffs, and the undertaking of the *Willinks* to execute that order, did not bind them to procure those bills at any other price than what might be then the fair market price of such bills in *Amsterdam*. Which direction the court refused to give, being of opinion that the *Willinks* were obliged to purchase according to the terms they had stated to *Purviance*, or not to have purchased at all, provided the jury believe that the *Willinks* were authorized by *Purviance* to purchase the bills for him on the terms aforesaid, and none other. The defendants excepted.

3. The defendants further prayed the direction of the court to the jury, that the said order and undertaking did not bind the *Willinks* to procure, for the use of the plaintiffs, bills which would produce in *Batavia* the sum or value of 30,000 *Spanish* dollars. On this prayer the Court [*Hollingsworth* and *Jones A. J.*] was divided in opinion,

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4. The defendants further prayed the court to direct the jury, that if the jury shall be of opinion, from the evidence, that *Purviance*, when he received the said bills from the *Willinks*, knew them to be bills on *Batavia* for 30,000 rix dollars, and knew the sum of money for which they had been purchased; and that the *Willinks*, in making that purchase, undertaking the execution of the order, and giving the information on which it was founded, acted fairly and with good faith, and procured the bills on as advantageous terms as they could then have been obtained; that then the acceptance of the bills by *Purviance* was an assent to, and affirmation of, the said purchase. On this prayer the court, two judges only being present, was again divided in opinion, and therefore refused it. The plaintiffs and defendants excepted.

5. The defendants further prayed the court to direct the jury, that if the jury shall be of opinion from the evidence, that when the *Willinks* received the said order, and undertook to execute it, they understood their letter of the 29th of July, 1801, to mean, that bills on *Batavia* to the amount of 75,000 florins, *Holland* currency, or $30,000 currency of the *United States*, at 2½ florins to the dollar, might be purchased at the rate of 48 stivers *Holland* currency, for each rix dollar of *Batavia*, in heavy stivers, with a discount of 10 or 12 *per cent*. and did intend their said letter to be so understood at the time of writing it, then and in that case, they are not responsible for having purchased the bills at that price. This prayer the court also refused, being divided in opinion, two judges only being present. Both the plaintiffs and defendants excepted; and the verdict and judgment being for the defendants, the plaintiffs appealed to this court.

The cause was argued at December term, 1812, on the *third*, *fourth*, and *fifth* bills of exceptions, before Buchanan, Earle, and Johnson, J. by

Martin and *Pinkney*, (Attorney General *U. S.*) for the Appellants, and by
W. Dorsey and *Harper*, for the Appellees.

As a preliminary question it was urged by the appellees' counsel, that by the act of October 1778, *ch.* 21. s. 14, any person affected by a division of the court might except. That by the division of the court in this case the appellees alone were affected, as the prayers in the *third*, *fourth* and *fifth* bills of exceptions, which are the only exceptions now before the court, were made on the part of the appellees, and the court being divided in opinion, were not granted; and by the refusal of the court to grant the prayers, the

law was left to the jury, and this was acquiesced in by the plaintiffs below. That no advantage could be taken by the appellants of the refusal of the court to grant the prayers of the defendants. That if the plaintiffs below had made contrary prayers to the court, and the court being divided, refused to grant them, then they might have excepted, and by their appeal asked a revision by this court; but having neglected to do so, they were now wholly precluded.

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The counsel for the appellants contended, that the plaintiffs below were affected by the refusal of the court to declare the law on the defendants' prayers. That before the act of 1778, *ch*, 21, either party might except, if the court refused to give an opinion on a prayer submitted to them. That there could be no reason why the plaintiffs should be compelled to call on the court for the converse directions to the jury, when the court had been divided in opinion, and had refused to give those asked for by the defendants, either for or against the plaintiffs. It would have been giving the court unnecessary trouble, and a waste of its time, for the plaintiffs to have thus acted. Here the court below was composed of two judges, one of them for giving, and the other for refusing to give the directions prayed, and the plaintiffs excepted to the opinion of that judge who was for giving the directions as prayed by the defendants. That if the plaintiffs had applied for directions, the opposite of those asked for by the defendants, the court would have been still divided, and no directions would have been given, and the law would have remained unsettled; and it amounted precisely to the same thing as if left on the refusal to grant the defendants' prayers.

Buchanan, J. delivered the opinion of the court. The court are of opinion, that the applications of the defendants below, as stated in the *first* and *last* bills of exceptions, taken on the part of the plaintiffs below, (being the 3d and 5th taken at the trial of the cause) ought to have been rejected; that the direction asked for as stated in the *second* bill of exceptions taken by the plaintiffs below, (being the 4th in the record,) ought to have been given, and therefore reverse the judgment of the county court, dissenting from the opinions of that court on each of those bills of exceptions.

He stated that he differed in opinion with the other judges as to the preliminary question. He was of opinion that the case was not before the court under the bills of exceptions.

JUDGMENT REVERSED.

A *procedendo* was awarded, and the cause remitted to the county court for a new trial.

6. A new trial was had in the county court at March term 1814, and a verdict given for the plaintiffs, for $12,775 current money, damages. A motion was made by

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the defendants in arrest of judgment, because no declaration had been filed in the cause. The county court sustained the motion, and arrested judgment on the verdict; and the plaintiffs appealed to this court.

The cause was argued at this term before BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Martin and *Winder*, for the Appellants. They referred to the acts of 1715, *ch.* 40, s. 3, and 1795, *ch.* 56, s. 3. and *Campbell vs. Morris*, 3 *Harr. & M'Hen.* 535, in which no declaration was filed, and which was a case much contested.

Harper, for the Appellees.

JUDGMENT REVERSED,

and judgment entered on the verdict of condemnation for $12,775 current money, damages, and $1975 93 current money, additional damages assessed by the court, and costs.

JUNE.

SINGSTACK'S EX'RS. VS. HARDING.

There is no difference between a sale of real and personal estate at auction, in relation to the statute of frauds. In either case, if the auctioneer inserts in his sale book the purchaser's name, the requisitions of the statute are complied with—The auctioneer being considered for this purpose, the agent of both parties.

A trustee cannot be a purchaser at his own sale.

APPEAL from *Frederick* County Court. This was a special action on the case, to recover from the defendant, (now appellee,) the difference between the amount of the purchase money for which certain real estate was sold to him at auction by the plaintiffs, (the appellants,) and the amount which that property brought on a resale—the defendant having refused to comply, &c. The general issue was pleaded. At the trial the plaintiffs offered in evidence the will of *Philip Singstack*, dated the 3d of October 1803, containing among other provisions, the following: "The residue of my estate, whether houses, lands, store goods, negroes, or other property real, personal or mixed, my will and desire is may be sold most for my interest, at the discretion of my executors hereafter named, both as to time of sale and terms of payment, and the money arising therefrom, my will and desire is, may be put to interest," &c. "But in case none of my said children should marry, or live to possess my property as aforesaid, or should die without wife or issue, and intestate, my will and desire is, in such case, (and in such case only,) that all my property intended for them, including in that case my lands at *Beason Town*, may be sold as aforesaid, and the money arising from such sale as aforesaid may be received by my said executors," &c. "And lastly, I hereby appoint and nominate my friends and neighbours, *Ignatius Davis* and *George Buckey*, the executors of this my last will and testament, and do hereby vest in them full powers to transfer and convey, by deed or otherwise, all my right to the lands and other property hereby directed to be sold in manner aforesaid." The plaintiffs also offered in evidence

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the letters testamentary granted to them on the 21st of December 1804; and that on the 31st of January 1805, public notice having been first given, they set up at public auction the house and lot mentioned in the declaration, in *Buckey's Town*, in *Frederick* county, the same being a part of the real property of *Philip Singstack*, deceased, and by his will directed to be sold by the plaintiffs. That at the day and place of sale, before and during the time of sale, the following written conditions of sale were publicly set up, which said terms were signed by the plaintiffs, and several times publicly proclaimed by the auctioneer before and during the said sale, viz. "Conditions—All who purchase of the personal property now offered for sale, to an amount exceeding three dollars, will be entitled to nine months credit, on passing their notes, on interest, with approved security—the interest to be released if such sums are punctually paid; for less sums the cash must be paid; no goods are to be removed before they are settled for. Any person purchasing, and not complying with those conditions some time on the day of sale, are to forfeit such sums as may be lost on a second sale of the same goods. If the executors should bid for any article, it is to be considered as bidding for themselves, and not for the estate, unless it be made known when the bid is made that they bid for the estate. For the real property one third of the purchase money will be required in hand, and bonds, on interest, with approved security, for the residue, divided into three equal annual payments—interest on the whole to be paid annually unless other proposals may be made by the purchasers that may be as agreeable to the executors. Those who purchase real property, and may not comply with those conditions, are also to be subject to pay any loss that may be sustained on a second sale of the same property. In other respects the sale to be conducted and regulated as is customary in such cases." They also gave in evidence, that at the said sale, on the day above mentioned, the defendant bid $2,000 01 for the said house and lot, and that being the highest bid offered, the house and lot were struck off to the defendant, by the auctioneer. That the clerk of the vendue thereupon, by the public direction of the auctioneer, entered the name of the defendant in the vendue book as the purchaser of the said house and lot for the said sum. That the defendant, when he made the said bid, was near the clerk of the vendue, and saw him with the vendue book before him. That on the said 31st of January 1805, after the said sale, the defendant told *Casper Mantz*, a witness in this case, that he was offered the interest of the purchase money as rent for the house and lot, and appeared to be satisfied and pleased with his purchase. That shortly after the sale, the defendant entered into the possession of the house and lot, and continued in the possession thereof some weeks; that afterwards, and before the 30th April 1805, he told the plaintiffs that he would not keep the house and lot, and refused

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to pay the money, or give the bonds as mentioned in the written terms of sale. Whereupon the plaintiffs informed the defendant, that they would proceed to sell the said property, and would hold him answerable for any loss that might be sustained on the second sale, to which the defendant made no answer. That afterwards, on the 30th April 1805, they inserted in two newspapers printed in *Frederick Town*, the following advertisement: "Public notice. Mr. *John L. Harding* being the purchaser at public sale of the house and lot late the property of *Philip Singstack*, deceased, on the great road leading from *Frederick-Town* to *Noland's* ferry, at the place called *Buckey's-Town*, and the said *Harding* not complying with the conditions of the said public sale, we shall, on the 24th of May next, offer the said house and lot again at public sale on the former terms, to wit: One third of the purchase money to be paid in hand, and the residue in three equal annual instalments, bearing interest from the day of sale; the interest on the whole to be paid annually, for which bond and security must be given. A deed to be executed by us when the whole of the purchase money is paid." Which said advertisement was published in each of the newspapers once a week until the 24th May 1805. That *Buckey's-Town*, a village in which said house and lot is situated, is between five and six miles from *Frederick-Town*. That afterwards, in pursuance of the said advertisement, and at the time and place therein mentioned, the plaintiffs did set up the same house and lot at public auction, on the following conditions:—"The conditions of our former sale on 31st January last, being as follows:—For the real property one-third of the purchase money will be required in hand, and bonds, on interest, with approved security, for the residue, divided into three equal annual payments, interest on the whole, to be paid annually, unless other proposals may be made by the purchaser that may be as agreeable to the executors. Those who purchase real property, and may not comply with those conditions, are also to be subject to pay any loss that may be sustained on a second sale of the same property. And as Mr. *John L. Harding* then became the purchaser of a part of the real property above named, to wit, the house and lot, on those conditions, and has not complied with the said conditions of sale—we do, for and in behalf of the estate for which we act, now offer at public sale, a second time, on the former terms and payments as above expressed, the said house and lot of ground, and shall claim of the said *John L. Harding*, any loss that may be sustained on a second sale of the same property. All who purchase the personal property now to be offered at public sale to an amount exceeding one dollar," &c. &c. At which said last mentioned auction, a certain *Jeremiah Turlton* bade $1500 01, which being the highest bid offered, he became the purchaser, and the house and lot was struck off to him. That many people attended

the said second sale, and that it was very generally known in *Frederick Town*, and the neighbourhood. That the plaintiffs seemed anxious that the said house and lot should sell for its full value. That many bids were made by different persons, and that the sale was altogether very fairly conducted; and that it was cried by the auctioneer on the last bid for half an hour before it was struck off. The plaintiffs then offered in evidence a deed from the plaintiffs to the said *Tarlton*, for the said house and lot so purchased, dated the 25th of June 1805. The defendant then offered evidence, that at the said first sale the defendant himself bid $1600, and *Ignatius Davis*, one of the plaintiffs, for and on behalf of the estate of *Singstack*, deceased, the testator, bid $2000, and that the defendant then bid one cent, on which bid the property was struck off to him for $2000 01. That the said property was not worth $2000, but that the utmost worth of it did not exceed $1500. The defendant further offered in evidence, that the house and lot at the second sale, was purchased by *Tarlton*, for the use and benefit of *George Buckey*, one of the plaintiffs; and gave in evidence a deed from *Tarlton* to the said *Buckey*, for the said house and lot, dated the 25th of June, 1805, in consideration of $1500 01. The plaintiffs then prayed the opinion and direction of the court to the jury, that if they find from the evidence that the defendant saw and read the written terms of sale herein first before mentioned, of the house and lot mentioned in the declaration, before he made the bid by which he became the purchaser of the said house and lot, and that the same was struck off to him on his bid of $2000 01, as above stated, and that the auctioneer publicly directed the clerk of the vendue, in the presence and hearing, and with the consent of the defendant, to write the name of the defendant in the vendue book as the purchaser, and that the same was accordingly immediately done in the presence, and with the consent of the defendant; and that the defendant entered into the actual possession of the said property. And if they further find that he afterwards refused to pay the money, or give the bonds as required by the said written terms of sale first above stated, and that the plaintiffs then gave him notice that they should sell the house and lot, and hold him answerable for any loss that might arise on the second sale, and that the defendant did not object thereto; and that the second sale was sufficiently notified and fairly understood, and that the house and lot, at the second sale, sold for $1500 01, that then the plaintiffs were entitled to recover. This opinion and direction, the Court, [*Buchanan*, Ch. J. and *Clagett* and *Shriver*, A. J] refused to give. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued at June term 1811, before POLK, NICHOLSON, and EARLE, J. and re-argued at the present term before NICHOLSON, EARLE, JOHNSON, and MARTIN, J.

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Taney, for the Appellants. The principal objection made at the trial in the county court, by the defendant, was that the first sale was void by the statute of frauds, 29 Car. II, ch. 3, and on this ground the court decided that the plaintiffs had no right to recover. In *Simon vs. Motivos*, 3 *Burr*, 1921, no distinction is made between sales of lands and goods, and although in some later cases it has been decided that sales of land are within the statute, there is nothing in the words of the statute to warrant the distinction. See sec. 4 and 17, 1 *Com. on Cont.* 75, 81. *Roberts on Frauds*, 115, 116. *Coles vs. Treecothick*, 9 *Ves.* 249. And nothing can account for the distinction that has been taken but the policy of the *English* laws to fetter the conveyances of land. The defendant in this case stood by, and consented to the entry of his name as the purchaser, and by subsequent conversations and conduct, confirmed the act of the clerk as his agent. But if sales of land are within the statute, yet the subsequent possession of the defendant takes it out of the statute. 1 *Com. on Cont.* 79, 81. It may be objected that these are chancery cases, but the court of chancery cannot compel the execution of a contract made void by statute. This would be to make the court of chancery above the law. The contract is void, or it is not. If it is void by the statute, the court of chancery cannot compel execution of it. But the court of chancery does compel execution, where possession has been delivered. Therefore, where possession has been delivered, the case is not within the statute. In the decree in the case of *Dallam vs. Onion*, in chancery in 1790, it is laid down as settled law, that sales of lands at auction are not within the statute of frauds. It was objected at the trial, though it did not seem to be relied on, that even if the first sale were valid, yet the difference of sales being in the nature of a penalty, could not be recovered. The case of *Simon vs. Motivos*, and *Mertens vs. Adcock*, 4 *Esp. Rep.* 251, are a complete answer to this objection. It may also be objected now, that at the second sale the property was purchased for one of the plaintiffs. This cannot be taken advantage of by any but the heirs of *Singstack*. It was for the defendant's advantage, as he did actually bid higher than any one else. As between all persons, but the heirs of the deceased, such a sale is good. It is only for their protection and benefit, that it will be set aside if, when they come of age, they chuse to require it. It was laid down by the chancellor, that if all the heirs were of full age, and consented, the sale might be ratified. And in this case it was for the benefit of the defendant that the sale was made. The children of *Singstack* have no interest in the second sale, if the first was good.

Shaaff, for the Appellee. He contended, 1. That the sale is a verbal sale under the statute of frauds. 2. That the property, being worth no more than $1500, and being

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purchased by one of the plaintiffs, the plaintiffs are not entitled so recover. 3. That there is no good consideration for the *assumpsit* declared on.

1. This sale is void by the statute of frauds, being a sale of lands. *Buckmaster vs. Harrop*, 7 *Ves.* 341. *Coles vs. Trecothick*, 9 *Ves.* 234. *Blagden vs. Bradbear*, 12 *Ves.* 466. *Mason vs. Armitage*, 13 *Ves.* 25. *Buckmaster vs. Harrop*, *Ibid* 456. *Wain vs. Warlters*, 5 *East*, 10. *Standsfield vs. Johnson*, 1 *Esp. Rep.* 101. *Walker vs. Constable*, 1 *Bos & Pull*, 306. All the authorities on this subject are put together in *Noland on Contract*, 176. The reason assigned why a sale by auction, where the auctioneer sets down the name of the purchaser, is still within the statute, is that the whole contract is *not* in writing, being only a memorandum of the name of the purchaser. A moment's reflection will show that the defendant's having taken possession cannot aid this case. The reason why a court in equity will in such cases interfere, is that such taking possession is evidence of a subsequent agreement, and upon that ground alone they enforce it, But in such case chancery will not enforce the contract, except by giving the party the consideration of the contract. In the present case, if application was made to equity by the vendors to support this contract upon the ground of the vendee's possession, &c, it would only compel the execution, upon the seller's conveying the land. Chancery never interferes to recover a penalty. This suit is for a penalty. It must be seen at once, that by resorting to the possession subsequently taken, the party can only succeed upon the ground that the contract continues, viz. That the vendee is entitled to the land, and the vendors to the money. Whereas this suit is on the principle that the vendee's right is gone, and the suit is for a penalty, and of course can only be sustained on the ground of the validity of the original sales by auction.

2. In this case one of the plaintiffs is the purchaser, and sales of this nature are considered in law as *fraudulent*. 2 *Fonbl.* 159. *Carter vs Lilly & Browning*, per Chan. *Hanson*, in 1805. This is an action of *assumpsit*, and it has always been considered, that a man, (especially in *assumpsit*,) shall never take advantage of his own conduct, which is in its nature fraudulent. In this case the vendor buys the property himself at the second sale—it is immaterial whether this particular sale was fair or not—the policy of the law in such cases is to prevent a man's buying at his own sale, and to prevent those frauds which might be practised, if such sales were permitted. It is contended by the appellees, that this second sale cannot be such a one as must have been contemplated by the terms of sale. The parties must have only meant a valid sale, a fair sale in legal contemplation, not such a sale as the vendors were bound not to make; not such a sale as might be vacated. If this is correct, there has been *no second sale*, under the true meaning of the terms of sale. It has been contended

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by the appellants' counsel, that the validity of this second sale cannot be controverted by the defendant, (*Harding*,) that being a question solely between the trustees, and the heirs. A slight examination will shew that this doctrine is not tenable. Suppose that the heirs, (as they may,) shall in future determine that this purchase by the trustee is not valid, the result is, that the second sale to the trustee is vacated, the first sale in force, and the purchaser, (the defendant,) liable under his contract—if it should be supposed to be valid, either as good, being by auction, or confirmed by taking possession—in which case the defendant would be liable for the purchase money, and (if this judgment should be reversed and he be compelled to pay the forfeiture,) be obliged also to pay the penalty. In this branch of the enquiry the question is as to the validity of the second sale—Because, even supposing the first sale not affected by the statute, yet the plaintiffs cannot recover if the second sale is not good, the present suit being for a forfeiture for not complying with the first sale.

3. This question depends on the second point, because if the second sale is not valid there is no consideration.

Nicholson, J. delivered the opinion of the court. The court are of opinion in this case, that the original sale to the appellee of the house and lot, was a good sale, the auctioneer being the agent of both parties, having entered the appellee's name in the auction book as the purchaser. The uniform current of the decisions have been, that such an entry was a sufficient memorandum in writing, of the contract in the sale of chattels, to gratify the requisitions of the statute of frauds; and that statute makes no distinction between a memorandum in writing for the sale of chattels, and the sale of lands.

But the court are of opinion, that the pretended sale to *Turlton*, being for the benefit of one of the executors, was no sale, and that therefore the appellee was not liable for the difference in the price arising from that supposed sale, and the original sales to him.

JUDGMENT AFFIRMED.

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Prentiss & Carter, Garn. of Story vs. Gray.

Where the certificate of the clerk to an affidavit, on which a warrant was founded directing an attachment to issue, stated that W D "is one of the judges of the court of common pleas for the county of *Suffolk*, in the commonwealth of *Massachusetts*, duly qualified and acting in said capacity, and that full faith and credit ought to be given to his legal attestations in court and out, in his said capicity"—*Held*, that as it did not appear by the certificate of the clerk that the judge had authority to administer an oath, as directed by the act of 1795, *ch* 56, *s*. 2, the proceedings were defective.

Whether or not the following are such legal defects in the affidavit, and warrant directing an attachment to issue, as to defeat the attachment? 1. The affidavit did not allege that the plaintiff was a citizen of the state of *Massachusetts*, or of any particular state, but that he was of *Boston*, merchant, a citizen of the *United States*. 2. The plaintiff did not swear that he produced the note on which the debt was founded, but it was merely recited by the judge that the note was produced. 3. The warrant of R G, on which the attachment issued, did not state, nor was it set forth, that he was a justice of the peace.

Appeal from *Baltimore* County Court. This was an attachment on warrant, issued the 21st of January 1811.

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The affidavit upon which the warrant for issuing the attachment was founded, is in these words: "Commonwealth of *Massachusetts*, *Suffolk* county, sc. Be it remembered, that on this 15th day of January, in the year 1811, before the subscriber, judge of the court of common pleas in and for the county of *Suffolk*, in the commonwealth aforesaid, personally appears *William Gray* esquire, of *Boston*, in the said county, merchant, and makes oath on the Holy Evangelists of Almighty God, that *Augustus Story*, not being a citizen of *Maryland*, and not residing therein, is *bona fide* indebted to him the said *William Gray*, of *Boston* aforesaid, merchant, (he being a citizen of the *United States*,) in the sum of fifteen thousand dollars of the lawful money of the *United States*, over and above all discounts. And the said *William Gray* at the same time producing to the subscriber the original note, which is hereunto annexed, subscribed by *Bradstreet* and *Story*, promising to pay the same sum to *Augustus Story*, or to his order, and by the said *Augustus Story* endorsed, for a valuable consideration, to the said *William Gray*, whereby the said *Augustus Story* became so indebted as aforesaid to the said *William Gray*. And the said *William Gray* also maketh oath, that he doth know that the said *Augustus Story* is not a citizen of the state of *Maryland*, and that he doth not reside therein. Sworn before me, *Wm. Donnison*, judge of the court of Common Pleas." Then follows a certificate by the clerk of the Court of Common Pleas for *Suffolk* county, under the seal of the court, certifying "that the honourable *William Donnison* is one of the judges of the court of common pleas for the county of *Suffolk*, in the commonwealth of *Massachusetts*, duly qualified, and acting in said capacity; and that full faith and credit ought to be given to his legal attestations in court and out, in his said capacity." The promissory note referred to in the affidavit was annexed. The warrant was dated the 21st of January 1811, and under the hand and seal of *Robert Gorsuch*, directed to the clerk of *Baltimore* county court, requesting him to file the affidavit and annexed promissory note, and to issue an attachment, &c. The attachment was issued on the 21st of January 1811, by the clerk of *Baltimore* county court, reciting the warrant from *Robert Gorsuch*, esquire, one of the justices of the peace for *Baltimore* county, directed to the sheriff of *Baltimore* county, and commanding him to attach the lands, &c. of the said *Augustus Story*, to the value of $15,000, according to the act of assembly, &c, and *make known* to the garnishees, &c. A *capias ad respondendum* also issued on the 21st January 1811; and a short note was filed, and copy sent, with the writ. At March term 1811, the sheriff returned the writ of attachment endorsed, "Laid in the hands of *John Miller Prentiss* and *Robert E. Carter*, trading under the firm of *Prentiss & Carter*, the 22d January 1811, in the presence of *Ashael Hussey* and *John Stevenson*—*Wm. Merryman* sheriff" The capias was returned endorsed, "N. E." The garnishees appear-

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ed and defended, &c. At March term 1812, the plaintiff's declaration was filed, and the garnishees pleaded *non assumpsit* by *Augustus Story*, and *nulla bona*; to which there were general replications and issues joined. *Verdicts* for the plaintiff, damages assessed to $16,297 50, upon the first issue, and goods and chattels in the garnishees' hands to the value of $4,338 75, upon the second issue. The verdicts were taken, subject to the opinion of the court, on a statement of facts, and subject also to all objections that might be legally made, either to the form or substance of the attachment proceedings in case no verdict had been rendered. The facts stated were these.—On the 26th of January, 1811, *Bond* and *Prentiss* obtained an attachment against *Story*, which was laid in the hands of the present garnishees, as also in the hands of *Thomas Marean*, another garnishee of *Story*, and returned to the same term of the court as the attachment in the present case. There were funds and effects belonging to *Story* in the hands of the present garnishees, at the time of the verdict, to the amount of 4,044 49, and at the same time there were funds and effects belonging to *Story*, in the hands of *Marean*, to the amount of $3,540 43. The questions submitted to the court were, 1. Whether the plaintiff was entitled to recover the funds of *Story*, in the hands of the present garnishees? If so, then judgment was to be entered on the verdict for $4,044 49. And 2d. Whether he was entitled to recover, in addition to the funds aforesaid, the funds of *Story* in the hands of *Marean*, in the present suit? If so, then judgment to be entered on the verdict for $7,584 92. It was admitted that the judge, before whom the affidavit in the attachment proceedings was made, was not, as a judge of the court of common pleas, competent, by the constitution and laws of *Massachusetts*, to administer an oath out of court. But that he was at the time duly commissioned, and acting as a justice of the peace for the county of *Suffolk*, and authorized as such, to administer an oath out of court. A *pro forma* judgment was entered on the case stated for the plaintiff, and condemnation on the verdict for $7,584 92, and costs. From that judgment the garnishees appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Williams, for the Appellants, contended—1. That upon the case stated, the appellee was not entitled to recover the money or property of *Story*, either in the hands of the appellants, or of *Marean*, because the proceedings, on which the writ of attachment issued, were *defective*. 2. That he was not entitled to recover the property of *Story* in the hands of *Marean*, because his attachment had never been laid in *Marean's* hands, even if his proceedings were sufficiently regular to bind the property in the hands of the appellants. As to the *first point*—The appellee's proceed-

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ings are defective, inasmuch as, 1st. The affidavit does not allege that the appellee was a citizen of the state of *Massachusetts*, or of any particular state, but only that he was a citizen of the *United States*. The *first* section of the act of 1795, *ch.* 56, enables only citizens of some one of the *United States* to have the benefit of the act. He contended that there were citizens of the *U. S.* who did not belong to any state; as those who live in the several territories, and could not, under this law, issue an attachment, consequently it was not clear by the affidavit that the appellee was entitled to be a plaintiff in attachment. 2. The affidavit is defective in this, that the affirmant does not swear that he produces the note on which the debt is founded; but it is merely recited by the judge that the note was produced. 3. The warrant of *Robert Gorsuch*, on which the writ of attachment issued, does not state, nor is it set forth in the proceedings, that he was a justice of the peace; consequently it does not appear that the clerk of the county court was authorised to issue the writ. He referred to *Jackson vs. Stiles, Coleman & Caine's Cases*, 468, where the supreme court of *New York* decided, that the *jurats* of affidavits must be signed by the judges before whom taken, with the addition of their official descriptions. 4. The certificate of the clerk, which is annexed to the affidavit, is defective, as it only certifies that the judge, who administered the oath, was a judge, and that full faith and credit ought to be given to his acts in and out of court; without certifying *that he had authority to administer such oath*, which is required by the *second* section of the act of 1795, *ch.* 56, and without which the affidavit cannot be good and sufficient evidence. 1st. Admitting, for the sake of argument, that the expressions in the certificate furnish grounds for implying that the judge had the authority to administer the oath, yet the court are not at liberty to make the inference under the provisions of the above section. In *Morris vs. Ludlam*, 2 *H. Blk. Rep.* 362, in a plea set up by a garnishee, who had been obliged to pay money to the plaintiff in attachment under the custom of *London*, the omission to state that the debt was due in the city of *London*, although necessarily to be implied, subjected him to a re-payment to his original creditor. Again, the constitution and judiciary system of the *U. S.* provide that the circuit courts of the *U. S.* shall have jurisdiction (among others) of cases in which the plaintiff and defendant are citizens of different states, or one of the parties is an alien. The courts of the *U. S.* have decided that this jurisdiction must appear upon the face of the proceedings. And in *Bingham vs. Cabot*, 3 *Dall. Rep.* 382, in which case the declaration set forth that the plaintiffs were of *Boston*, in the district of *Massachusetts*, the supreme court of the *U. S.* decided that it was not sufficiently shown that the plaintiffs were citizens of *Massachusetts*, although they were stated to be of *Boston*, &c. and though even had they been aliens, it would have been sufficient to

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give the jurisdiction. In *Turner vs. Enrille*, 4 *Dall. Rep.* 7, the declaration stated that the plaintiff was Marquis *de Caso Enrille*, of —— Island, and the defendants were of *Newbern*, in *North Carolina*, the supreme court decided that it was not sufficiently averred that the plaintiff was an alien, or that the defendants were citizens of *North Carolina*. In *Abercrombie vs. Dupuis*, 1 *Cranch*, 343, the declaration represented the plaintiffs to reside in the state of *Kentucky*, and the defendants in the state of *Georgia*, yet the supreme court decided there was no sufficient averment of citizenship. In *Hodgson vs. Bowerbank*, 5 *Cranch*, 303, the declaration stated the defendants to be merchants of the district of *Maryland*, and yet the court determined that the omission of the word *citizens* was a fatal defect, and that it was not enough to state them to be of *Maryland*. In *Brookes vs. Hunt*, *Coleman and Caine's Cases*, 468, an omission of that which was easily to be inferred, was held to be fatal in an affidavit. The courts in this state have decided, that the omission by the justices who take acknowledgments of deeds, to certify that a *feme covert*, who comes before them, "makes her acknowledgment without being induced thereto by fear or threats of ill usage of her husband, or fear of his displeasure," is fatal, although they certify that the acknowledgment was made *willingly and freely*. Although it is impossible that a *feme covert* could make an acknowledgment of a relinquishment of her interest in an estate, *willingly and freely*, if it were made under a fear or threat of ill usage from her husband, or fear of his displeasure. In *Smoot's Adm'r. vs. Bunbury's Ex'r.* 1 *Harr. & Johns.* 136, it was decided, that certain words in a probate prescribed by law, being omitted, the probate was deemed to be defective. The provincial court quashed an attachment under the act of 1729, *ch.* 8, in *Thompson vs. Towson*, 1 *Harr and M'Hen.* 504, on the ground that the affidavit did not state that the "debt was *bona fide* due," although it set forth that no part of the money had been paid more than credit given, &c. It was also there contended, that the magistrate's warrant was defective, because he certified that the debt was due *as appeared by a bond*, when he should have certified it to be due positively, without reference. These several cases show, that the omission to set forth expressly, that which is required to appear by the proceedings, is fatally defective, although enough is stated, from which that which is so material may, or even must be, irresistibly inferred. In the authorities referred to it will be found, that the provisions of the law, which require these particular and special averments, are far less explicit and less precise than the expressions in the *second* section of the act of 1795, *ch.* 56, with which this certificate purports to comply. This section declares that the affidavit shall not be good and sufficient evidence, unless the fact is expressly averred that the judge had authority to administer such oath. It excludes any other evidence of such authority, than the certificate.

2d. But there is not enough set forth in this certificate, from which it may be inferred that the judge had authority to administer the oath. The certificate merely states that the judge was a judge of the court of common pleas of *Massachusetts*, and that full faith and credit ought to be given to his attestations in and out of court. This is only certifying that he was a judge, and *as such* full faith should be given to his attestations. But this statement of his official character, and of the credence due to his official acts, does not come up to the provisions of the *second* section of the act of 1795, *ch.* 56, which require that the judge should be of that character, and possessed of those peculiar powers, which entitle him to administer civil oaths out of court. The whole amount of the certificate is, that the person before whom the affidavit was made, was a judge; and unless it can be shown that it is essentially inherent in all judges to be clothed *ex virtuti officii* with authority to administer civil oaths out of court, there is not sufficient grounds even for inferring that this judge was authorised to administer this oath. Now, it is not incidental to all judges to have this power, nor do they exercise this power, but in virtue of a special authority, conferred from time to time by law. Neither does *Coke*, *Blackstone*, *Comyn* or *Bacon*, in enumerating the powers and authorities of a judge, include that of administering civil oaths out of court, as appertaining to their office. The judges of the court of the King's Bench, having criminal jurisdiction, have authority to administer oaths relative to public offences; but even this power is not possessed by the judges of the court of common pleas. And the judge who administered this oath, in this case, is of the court of common pleas, which court has no criminal jurisdiction in *Massachusetts*. Courts of justice have essentially, and as appertaining to their very nature, authority to administer oaths in all cases of which they have jurisdiction. Justices of the peace are supposed more peculiarly to have authority to administer oaths in all cases; but it does not appear by this certificate that this judge was a justice of the peace, unless it can be shown that the character of a justice of the peace appertains to his office of a judge. This, however, cannot be admitted, for it does not appear by the books that it always, or even usually, appertains to the office of a judge to be a justice of the peace. The judges of the King's Bench are *ex officio* justices of the peace, but the judges of the court of common pleas are not; and it is in the highest degree probable, that this judge, who belongs to the court of common pleas of *Massachusetts*, which resembles the court of common pleas in *England*, is not a justice of the peace. There are many judges of courts in this state who are not justices of the peace, and who undoubtedly have not authority to administer oaths out of court—as justices of the levy court—judges of the orphans court, and judges of the criminal court, as such. These judges frequently, oftener than otherwise,

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have the additional character of justice of the peace united to them by a separate commission. And to satisfy the court, in cases of attachments, that the judge had authority to administer an oath, the law requires that the certificate of some person belonging to classes therein designated, and who are in a situation to know the extent of the powers of the judges of their states, should set forth—not that he is a judge, for that is not required, and is sufficiently shown by the judge himself—but that he is authorised to administer such oaths. The certificate is to be the only evidence, all other kinds of evidence are excluded. In this certificate nothing more can be extracted from it, than that the judge is of the official character he professes to be. It will be found, by reference to the acts of all legislatures, when they prescribe the taking of oaths, that they specially designate the persons or officers before whom they are to be taken. This would be a useless provision, if there were officers to whom it officially appertained to administer all oaths. In 1 *Jacob's L. D.* tit. *Affidavit*, 61, an affidavit is defined to be "an oath in writing, sworn before some person who hath authority to administer such oath." It does not say, sworn before a judge or justice, or other particular officer. The courts in *England* are authorised to appoint commissioners to take affidavits in causes depending before them; and if they are not taken before authorised commissioners, they are not valid. From these considerations, and taking into view the peculiar wording of the *second* section of the act of 1795, *ch.* 56, and the expressions of the certificate, on which this discussion turns, it must be concluded, that there is not sufficient grounds for inferring that the judge had the authority to administer the oath in this case, even if the court were at liberty to be satisfied with a mere inference.

The *second point.* The appellee was not entitled to recover the property of *Story* in *Marean's* hands, &c. This position was abandoned by the counsel for the appellee, who considered the objection a valid one.

Winder, on the same side, referred to *Hepburn vs. Ellzey*, 2 *Cranch* 445, where it was held, that a citizen of the district of *Columbia* was not a citizen of a *state* within the meaning of the constitution; and *The Corporation of New Orleans vs. Winter*, 1 *Wheat.* 91, where it was determined that a citizen of a *territory* could not sue a citizen of a *state* in the courts of the *U. S.*

Martin and *W. Dorsey*, for the Appellee. 1. The oath taken by the appellee, as stated in the affidavit, excludes the idea of his being a foreigner, as he is stated to be a citizen of the *United States*. His being stated to be of *Boston* in the county of *Suffolk*, shows by necessary inference that he is a citizen of *Massachusetts*. The cases cited arose under the constitution and laws of the *U S.* as to the question of jurisdiction, and are not applicable to a case

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like the present. To show that the affidavit was sufficient they referred to *Campbell vs. Morris*, 3 *Harr. & M'Hen.* 535. 2. It is not required by the act that the party should swear that he produces the note, &c. upon which the debt is founded. He is only to swear to the amount due to him, and to produce to the judge the notes, &c. who annexes it to the affidavit. 3. The objection that *Gorsuch* was not a justice of the peace is obviated, because it is certified by the clerk in the caption of his record, and also in the attachment, that he was a justice of the peace, and that is as sufficient evidence of that fact, as if he had himself stated that he was a justice of the peace. *Brydon vs. Taylor*, 2 *Harr. & Johns.* 296. *Hall vs. Gittings' Lessee*, *Ibid* 383. *Lawrence et ux. Lessee vs. Heister et al.* 3 *Harr. & Johns*, 343, 4. The act very strangely requires that the clerk should certify that the judge had authority to administer an oath, without permitting the certificate of the judge to prove itself. The clerk, to follow the words of the act, must use the word *such*, and that would make his certificate nonsense. It is admitted in the statement that *Donnison*, the judge in this case, was authorised to administer an oath; and it is to be presumed that he had authority to administer it, or he would not have done so. The clerk certifies that he was a judge, and that full faith and credit ought to be given to his acts. If he had no authority to administer an oath, the clerk would not have said that full faith and credit ought to be given to his acts.

Winder, in reply. The appellee is entitled to strict justice only. He proceeded under an act of assembly giving special privileges to particular persons, and he must show that he comes strictly within its provisions. 1. The appellee's being stated to be of *Boston*, &c. and the affidavit being made in the county of *Suffolk*, in *Massachusetts*, does not necessarily imply that he was a citizen of *Massachusetts*. The expressions in the constitution of the *U. S.* upon which the cases cited for the appellants were decided, are not so strong as those in our act of assembly. A citizen of the district of *Columbia*, or of any of the territories, could not obtain an attachment under the act of 1795, *ch.* 56. The appellee might be of *Boston*, merchant, and yet not a citizen of *Massachusetts*. In *Campbell vs. Morris*, the court only acted upon the points raised, and there was no objection made to the form of the affidavit by the counsel. 2. The act says, and *at the same time producing* the cause of action, and it should have been asserted by the appellee that the note produced is the one by which the defendant was indebted to him. Here the verity of the note is simply the assertion of the judge, and not that of the appellee. 3. The appellee's counsel seem to think this objection is fatal, unless they can bring themselves within the law, and they attempt to do so by saying the certificate of the clerk supplies the defect. The act says, the warrant must be granted by a justice of the peace, &c. in his character

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of justice, &c. The question is not whether *Gorsuch* is a justice of the peace, but whether he did the act as such. The recital by the clerk is unfounded from any thing that came from *Gorsuch*. The clerk might know that he was a justice, but he could not know that he had done the act in his character as such. The recital in the record did not exist when the attachment issued or was returned; and the recital in the attachment is unsupported by any thing appearing, and cannot aid the defect. The clerk's issuing the writ, and stating *Gorsuch* to be a justice, could not make his illegal act valid. He may have sent his resignation to the executive, of which the clerk had no knowledge, and may not have acted as a justice when he issued the warrant. If he had stated himself to be a justice, then it might be inferred he was what he stated himself to be. 4. No other evidence, but the certificate of the clerk, that the judge had authority to administer the oath, can be received. The act is imperative that it shall not be evidence unless there be a certificate of the clerk that the judge had authority to administer the oath. No admission of the parties can cure the defect. The certificate by the clerk is only that he is a judge, and that to his legal attestations due faith and credit were to be given. He does not certify that the particular act was a legal one. The legal acts which he certified were not those under our laws, but those under their own laws, when he acted as judge of that court of which the clerk certified he was a judge. The incident of administering an oath does not necessarily follow the office of a judge. It is specially given under particular acts of the legislature.

THE COURT stated, that as it did not appear by the certificate of the clerk of the court of common pleas for *Suffolk* county, in the state of *Massachusetts*, that the judge, before whom the affidavit to obtain the attachment was made, had authority to administer an oath, the proceedings were defective. The other points raised by the counsel were not decided by the court.

JUDGMENT REVERSED.

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To prove the location of a tract of land called *C*, a commission for marking & bounding that tract, and the return thereof, were offered in evidence. The commissioners certified in their return to the commission, that they had taken the depositions of witnesses, and caused a survey to be made of the land, and settled and adjusted the location thereof, and marked and bounded the same, but that after duly considering the evidence, &c. they could not agree in opinion, and therefore made no establishment or further return thereof—*Held*, that the commission and return were not evidence.

The grant of a tract of land called *M*, dated in 1776, described it as "beginning at the end of the N 200 ps. line of a tract of land called *C*, (granted in 1695,) it being the second line of said land, and running thence N E by N 44 ps." &c.—*Held*, that the beginning of *M* depends on the true location of *C*, and that such beginning must be at the place or point where the N 200 ps line of *C* terminates—and that that termination was to be ascertained by the jury according to the evidence, and on such allowance for the variation of the compass as the jury might find to be right and proper.

That in locating *M* the jury were bound to begin at the place where they found the N 200 ps. line of *C* terminates, and could not begin at *M* the place where they might be of opinion, from the evidence, the taker up of that tract actually terminated the N 200 ps. line of *C*, for the purpose of fixing the beginning of his own tract.

APPEAL from *Baltimore* County Court. This was an action for a trespass committed on a tract of land called

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M'Clellan's First Venture. The general issue was pleaded, and plots were made under a warrant of resurvey issued for that purpose.

1. The plaintiff, (now appellee,) read in evidence at the trial, the patent of *M'Clellan's First Venture*, surveyed on the 20th of March 1776, for, and patented to him, on the 14th of January 1809. The patent described this tract as "beginning at the end of the N. 200 pr. line of a tract of land called *Come by Chance*, it being the second line of said land, and running thence N. E. by N. 44 ps." He also gave in evidence, that the said tract of land was truly located on the plots, and that the trespasses located by him were committed by the defendant before the bringing of this action. The defendant then read in evidence the patent of the tract of land called *Come by Chance*, surveyed on the 24th of November 1694 for, and granted to, *John Richardson*, on the 10th of November 1695, for 282 acres, and "lying on the west side of *Jones's Falls*, in *Patapsco*, in the woods, beginning at a bounded Spanish oak standing by the side of the falls, being a bounded tree of a parcel of land of *Thomas Durbins*, and running thence W. N. W. with the said *Durbins'* land called *Hab Nab at a Venture*, 260 ps. then N. 200 ps." &c. Also the patent of a tract called *Ponteney's Chance*, surveyed on the 16th of September 1766, and granted to *Edward Pontany* on the 10th of October 1775, for 45 acres—"Beginning at the end of 44 ps. on the third line of a tract of land called *Come by Chance*, and running thence N. E. by N. 67 ps. N. 22 W. 10 ps." &c. And gave in evidence, that these tracts were truly located by him on the plots in the cause. The defendant then, to prove the true location of *Come by Chance*, produced and offered to read in evidence a commission taken out on the 13th of December 1802, by him, to *mark and bound* that tract, and the return and execution of said commission, as duly returned and recorded. By the return to the commission, the commissioners certify, that they had taken the oath, given the notice, and met on the land the 3d of February 1803; appointed and qualified a surveyor; took the depositions of witnesses, and caused a survey to be made of the land, and settled and adjusted the location thereof, and marked and bounded the same; and conclude their return as follows: "We the said commissioners do further certify, that after duly considering the evidence and circumstances relative thereto, we cannot agree in our opinion, but divide thereon, therefore have made no establishment or further return thereof. In testimony," &c. Dated 10th November 1803, and signed and sealed by four commissioners. To the reading of this commission and return in evidence, for the purpose aforesaid, the plaintiff objected. And the Court, [*Nicholson*, Ch. J.] sustained the objection, and refused to let the evidence be given. The defendant excepted.

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2. The plaintiff then offered evidence to prove, that at the time when *M'Clellan's First Venture* was taken up and surveyed, the taker-up thereof, in order to ascertain its place of beginning at the end of the second line of *Come by Chance*, ran the two first lines of that tract from the place marked A on the plots, its admitted beginning, as the needle then pointed, without any allowance for the variation of the compass, and in the manner located by the plaintiff on the plots; and then prayed the court to direct the jury, that in fixing the true location of *M'Clellan's First Venture*, they are not bound to begin it at the place where they may believe the second line of *Come by Chance* terminates, according to what they may now find to be the true location of that tract, but that they may begin *M'Clellan's First Venture* at the place where they may be of opinion, from the evidence, the taker-up of that tract actually terminated the second line of *Come by Chance*, for the purpose of fixing the beginning of his said tract of *M'Clellan's First Venture*; and this direction the court gave to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the last term, before BUCHANAN, EARLE, and MARTIN, J. and was re-argued at the present term before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Harper, for the Appellant, on the *first* bill of exceptions, referred to *Shield's lessee vs. Miller*, *(ante* 6, 7.*)*

Martin, for the Appellee, on the *first* bill of exceptions, cited *Drane vs. Hodges*, 1 *Harr.* & *M'Hen.* 262. On the *second—Tenant vs. Humbleton*, 3 *Harr. & Johns.* 233. *Carroll et al. lessee vs. Norwood*, 1 *Harr. & Johns.* 186. *Shield's lessee vs. Miller*, *(ante* 6, 7.*) Webb's lessee vs. Beard*, 1 *Harr. & Johns.* 349. *Darnall's lessee vs. Goodwin*, *Ibid* 282 *Smith's lessee vs. Volgamot*, 2 *Harr and M'Hen.* 155. *Dougherty's lessee vs. Denny*, 3 *Harr. & M'Hen* 430. *(a.)*

(*a*) The facts of the case of *Dougherty's lessee vs. Denny*, 3 *Harr. & M'Hen.* 430, and which are not there reported, were these: On the 4th of February, 1779, *Robert Harwood* by deed conveyed to the lessor of the plaintiff, "all that part of a tract of land called *Poplar Levell*, beginning at the end of 256¼ perches, on the N. line of the said land, and running N. 63¾ perches, then W. 45 perches, then S. 30° E. 56 perches, then S. 17° E. 12 perches, then with a straight line to the beginning, containing 10 acres of land more or less." The ejectment was brought for *Poplar Levell*. Defence was taken on warrant, and by the plots it appeared that the plaintiff located *Poplar Levell*, with an allowance of 5° 45′, and the defendant located that tract with an allowance of 45 minutes only. By the depositions of witnesses in the case, it was proved in what manner that part of the tract conveyed by *Harwood* to the lessor of the plaintiff was laid off to him, which was as the needle then pointed: and the declarations of *Harwood* made at the time as to what land he had sold to *Dougherty*, were also given in evidence.

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Chase, Ch. J. delivered the opinion of the court. The court are of opinion, that the beginning of *M'Clellan's First Venture* depends on the true location of the tract of land called *Come by Chance*, which said beginning must be at the place or point where the north 200 perches line of *Come by Chance* terminates—the termination of the said line to be ascertained by the jury according to the evidence, and on such allowance for the variation of the compass as the jury may find to be right and proper; it being the exclusive right and province of the jury to decide on the proper allowance to be made for such variation according to the proof.

The court are also of opinion, that the jury were bound in locating *M'Clellan's First Venture*, to begin at the place where they found the north 200 perches line of *Come by Chance* terminated, and think the court below erred in giving the direction prayed by the plaintiff, as stated in the *second* bill of exceptions.

This court concur with that court in the opinion expressed in the *first* bill of exceptions.

Johnson. J. This is an action to recover for a trespass alleged to have been committed by *Green*. the appellant, on the appellee's land called *M'Clellan's First Venture*.

In the trial of this cause two exceptions were taken on the part of the defendant—The first, because the court refused to permit the land commission, offered by him, to be read to the jury; but the objection to the opinion pronounced by the court on the first exception appears to have been waved in this court.

The tract of land called *M'Clellan's First Venture*, calls to begin "at the end of the North 200 perches line of a tract of land called *Come by Chance*, it being the second line of said land."

In the trial of the cause the plaintiff offered evidence to prove "that at the time *M'Clellan's First Venture* was taken up and surveyed, the taker-up thereof, in order to ascertain its place of beginning at the end of the second line of the tract called *Come by Chance*, ran the two first lines of that tract from the place marked A on the plots, its admitted beginning, as the needle then pointed, without any allowance for the variation of the compass, and in the manner by him located on the plots in the cause; and thereupon prayed the court to direct the jury, that in fixing the true location of said tract called *M'Clellan's First Venture* they are not bound to begin at the place where they may believe that the second line of *Come by Chance* terminates, according to what they may *now* find to be *the true* location of that tract." Which direction the court gave. And the question for the consideration of this court is, Whether the opinion so pronounced was correct?

In examining this question I propose to establish three propositions—

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1st. That on principles of reason and justice it is correct that the land should be located as it was when taken up.

2d. That such a location is sanctioned by general principles of law; and

3d. That no decision has been made by either the general court, or the court of appeals, conflicting with the right of making such a location; but that they have been of an opposite character.

On the first point I apprehend it must be conceded by all, that the land actually run out and designed to be purchased, should pass by the conveyance; and that if by any mistake, or inaccuracy of expression, a part should be left out, or more included, that a power ought to exist by which such errors might be corrected. For the land intended by both parties to be sold should pass by the deed or grant. If then it be correct, that the land intended to be purchased should pass by the conveyance, are there any general principles of law which will prevent the location of the land in question from being made, as it was, when run out? *M'Clellan's First Venture* was surveyed on the 20th of March 1776, and the contract *then made*, we are *now* called on to expound.

Nothing is more evident, than that every contract should depend on the *law existing* at the *time* it was made; and that the *language* in which a contract is expressed, should be construed to have the *same meaning*, as would have been given to it at the *time* it was used.

Let us examine the certificate in question by these rules. In the year 1776 the surveyor, when he run the land, was *bound* to run the anterior tract, according to the expressions of the certificate—By them he was governed; by them he was bound. If, at that *period*, an action of ejectment had been brought to recover any tract of land, containing courses and distances only, no other location would have been admitted, but such as they expressly pointed out; the least deviation from them, would have excluded the reading of the patent at the trial of the cause.

It was then not merely the *custom* to run as the needle pointed, but such was the *law* of the land; and such would *now* have been the *law*, had the legislature not thought fit to have changed it.

If then in the year 1776, the beginning of *M'Clellan's First Venture* could only be ascertained by running the two first lines of *Come by Chance* at the point of the needle, and if such would have been the rule at this day, but for a legislative interposition, our attention is naturally drawn to an examination of the law, by which that change has been made; and unless, by that law, we are compelled to give a location evidently different from that which was given when the land was taken up, it would seem to follow that no departure ought to be made from that survey.

But, so far from finding the legislature disposed to vary the survey, and thereby embracing within it, or excluding from it, land not originally included, we shall discover their

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sole object to have been to confine the survey to the original land, and to confirm the purchaser in the *particular* land taken up by him.

By the 12th *section* of the act passed at November session 1781, *ch.* 20, which recites, "that whereas land originally included by the courses and distances, expressed in the certificate of lands heretofore granted, is now excluded by the variation of the compass, which ought not to be taken from the person claiming under such survey or grant," it is in substance enacted, that on the chancellor being satisfied as to the fact, he shall refuse a patent to any *other* person, who hath, or may survey the land, and shall give a confirmatory grant, gratuitously, to the *original* taker-up.

The courts of law, although not in words, authorized to act on the subject, have gone further than the letter of the law, grounding their decisions on its equity and spirit. The chancellor was empowered to refuse to the one, and to grant to the other, but should the same not have been brought before him, as was the case in a variety of instances, then, except for the liberal construction, placed by the courts on this law, a junior patentee, holding land comprehended in a survey, would have retained it, notwithstanding the same was included within the lines of an ancient grant, and only excluded therefrom by the variation of the compass.

The courts of law have referred the subject to the consideration of the jury, and have left it entirely to them to determine whether there was any, and what variation; and, if they find that the land was originally included, then the elder survey and grant prevailed. Those who are conversant with the rules of the land office, know that various regulations have been made, having it for their object to confine the certificate to the land actually taken up. For that end, calls to natural visible objects were inserted; but the agents of the Lord Proprietary, discovering that by them more land was included than was paid for, adopted several schemes to prevent it, and finally that of excluding all calls, except at the place of the beginning. It was during the existence of that regulation that the present survey was made; and as it calls for no visible object, as its commencement, but only for the termination of a line of a former survey, the question is, How is this place to be found?

In examining this subject, we must constantly keep in mind, that the location of a junior tract, is not intended to affect the true legal location of a senior, for it can never be permitted, that by having erroneously located a subsequent tract, the location of a prior one is in the slightest degree affected; and although in the case before the court, the plaintiff has laid down *Come by Chance* as it was run when *M'Clellan's First Venture* was made, yet I wish it distinctly to be understood, that I do not mean, in the most remote manner, to intimate that such is the true location.

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The inevitable effect of causing a tract of land taken up before the year 1781, to run to, and be governed by, the location of a tract it may call for, when each of them contain courses and distances alone, will, if the first is established with what is termed full variation, be to include in the junior survey, land not originally included, and to exclude part that was; but if one degree for variation for 20 years, will bring the respective tracts to their original location, then the commencement of the junior survey, calling for the line of an elder for its beginning, ought to be ascertained, by correcting the elder tract for that purpose, to the date of the junior survey. Nothing is more evident than that such locations will embrace the land purchased.

It is not my intention to go minutely through the cases which have been cited; for as they have all been, so far as they bear on the present question, in favour of the opinion pronounced by the court below, which opinion I consider correct, exclusive of authorities, I might here rest my judgment.

It has been considered as somewhat novel, to found the judgment of this court on a decision of the general court. This court, as every other judicial tribunal, must have some rules to regulate their decisions; and where a case for the first time is brought before them, where can they look with more propriety for the establishment of principles, applicable to the subject, than to the late general court; for my own part, I have no hesitation in declaring, that the judgment of that tribunal generally, but more *especially* on the subjects of *grants of land*, have more influence on my mind than any *English* authorities whatever. And the rules laid down by them, and acquiesced in for a length of time, must be considered as the law by which, (so far as they go,) real property has been held. I have examined the case of *Webb's lessee vs Beard*, (1 *Harr.* & *Johns.* 349,) and feel myself bound to declare, that it is not so strong to establish the principle, that a junior, calling to begin at the end of a line of an anterior survey, is not bound by the true legal location of such survey, as, I believed at the time, when *Hambleton and Tenant* was determined. Any inaccuracy which I may have made, or shall in future make, in the representation of a decision, will, as it is now, be readily acknowledged; and in the case of *Tenant and Hambleton*, it would have been a source of much regret if I believed such representation caused a different decision than otherwise would have been made. In that case the question depended on the location of a tract of land called *Neglect*—this tract called to run a certain course and distance to another tract called *Elliott's Folly*, &c. *Elliott's Folly* also had calls. The tract called *Neglect* was surveyed by the defendant in the cause, and in making such survey, he run *Elliott's Folly*, and the tracts it called for, by course and distance, and thereby, as he apprehended, ascertained the vacant land. On the trial of the cause, the tracts called for by *Neglect*, were laid

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down by the defendant according to their calls, and by the plaintiff as they were laid down at the time *Neglect* was taken up. The deposition rejected by the court went to establish how they were laid down; it was rejected, on the ground of being inconsistent with the grant. But that decision was reversed.

It will be perceived, that *Neglect* calls for no visible object. I was under the impression that the *Gleanings* in the case of *Webb and Beard*, was in the same situation; and if so, the cases would have been strictly analagous. But in the latter case, though a tree is called for, and supported by some evidence, yet, my memory leads me to believe, that in that case it was determined, that if the proof as to the tree failed, that the beginning might be ascertained by running the tracts called for without their calls —on the ground, that as they contained a double description, that that description should be received, which comported with the facts, as they existed, when the junior survey was made; for, if complete evidence existed as to the tree, the patent under which the plaintiff claimed could never have been obtained, if that fact had been disclosed to the chancellor—nor, do I presume, would the counsel who conducted the case on the part of the plaintiff, ever have brought the suit, with the previous knowledge, that the tree could be established.

It is not for me to say whether those decisions ought to have any influence with this court; that is submitted to their consideration. For my own part, I have long reflected on cases of this description, and am led to think that the opinion pronounced in *Tenant & Hambleton*, is calculated to carry into effect the intention of the contract, as it existed at the time it was made; that it is consistent with, and supported by, general principles of law, more especially that it accords with the law in operation at the period it was entered into, and is in conformity with the provisions of the act of 1781, and that it is supported by the decisions which have been adjudged on the subject. I am, therefore, of opinion, that the judgment ought to be affirmed on both exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

BOEHME vs. AISQUITH, *qui tam*.

JUNE.

A *qui tam* action was brought founded on the act of 1704, *ch* 69, against usury, for £450

APPEAL from *Baltimore* County Court. This was an action of debt brought on the 30th of September 1809, for debt. The declaration contained two counts, each demanding £450 on a corrupt agreement for a loan of £150, from the 2d of September 1805 to the 5th of October 1805, for which the lender was to receive £90, and for securing the payment thereof, the borrower gave a promissory note, endorsed by him to the lender, for 240 dollars payable in 30 days. Verdict, on *nil debet* pleaded, that the defendant owed the said sum of 450 dollars—judgment entered for 450 dollars debt, and 900 dolls. damages and costs; to be released on payment of 450 dollars, with interest, &c. On appeal judgment *reversed*.

Quere, Whether a *qui tam* action will lie where the usurious loan is for a less time than *one whole year*?

Whether the judgment to be entered on a verdict in such an action is embraced by the act of 1809, *ch.* 153, s 4, for the amendment of judicial proceedings? *Quere*.

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$450. The declaration contained two counts, each demanding $450, and setting out the promissory note hereafter mentioned, and a corrupt agreement between the defendant, (now appellant,) and the plaintiff, who sued, &c. (now appellee,) for a loan of $150 by the former to the latter, from the 2d of September 1805 to the 5th of October 1805, for which the former was then to have $90; and for securing the payment as well of the $150 as of the $90, the plaintiff endorsed the said note to the defendant. The defendant pleaded *nil debet*, and the act of limitations. To these pleas there were the general replications, and issues were joined. At the trial the plaintiff gave in evidence, that the defendant, at the request of *Edward Aisquith*, on the 2d day of September 1805, paid him the sum of $150, for the following promissory note:

"$240. *Baltimore*, September 2d, 1805.

Thirty days after date I promise to pay *Edward Aisquith*, or order, two hundred and forty dollars, for value received. *John Neale.*"

Endorsed in his own hand writing. *Edward Aisquith.* That after the time appointed for the payment of the note, the same being unpaid, the defendant on the 30th of October in the same year, passed it to *Thomas Baltzell*, and received from him a quantity of goods, which at the usual selling price, amounted to the sum of $240, and agreed to pay the said sum of $240 to *Baltzell*, if he should not recover the amount of the note from *Aisquith*, or from *Neale*, the drawer. That a suit was commenced by *Baltzell* against *Aisquith* on the said note, and judgment was obtained against him for the amount of the sum of money mentioned in the note, with interest and costs; and that a *fieri facias* issued on the judgment, and was delivered to the sheriff of *Baltimore* county on the 22d of July 1808, returnable to October term in the same year. That the sheriff, on the receipt of the *fieri facias*, agreed to become answerable for the payment of the amount of the judgment, but did not actually pay the same until the month of November following; nor did he receive payment thereof from *Aisquith* until after he (the sheriff) had actually paid the same. The defendant then prayed the court to direct the jury, that the plaintiff was not entitled to recover, even although the jury should believe the facts above stated. This direction the Court [*Nicholson*, Ch. J.] refused to give. The defendant excepted. Verdict, that the defendant owed the said sum of $450, and that he was guilty, &c. within one year, &c. Judgment entered for the said sum of $450, current money debt, and the sum of $900 current money damages, (being the damages laid in the declaration,) and costs; to be released on payment of $450, with interest, &c. From which judgment the defendant appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

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W. Dorsey, for the Appellant. 1. Admitting the proof to be that there was a usurious lending, yet it is not embraced by the act of 1704, *ch.* 69. The *first* section of that act contains a general prohibition, and declares what shall be usury. The *second* section declares that all bonds, &c. made upon or for usury shall be void; and the *third* section, (which is the section on which the plaintiff founds the demand for treble the sum loaned) declares "that all and every person and persons who shall upon any contract to be made, take," &c. "by means of any corrupt bargain, loan," &c. "for the forbearance or giving day of payment for *one whole year*, above the sum of money aforesaid," (that is, £6 for £100,) "shall forfeit and lose, for every such offence, the treble value of the money so lent, one half to the Queen, and the other half to him that shall sue for the same, to be recovered by action of debt," &c. It is clear, that as the usurious interest claimed was for a shorter time than *one whole year*, the action could not lie. An indictment might lie, but not a penal action for treble the value. Penal statutes must be construed *strictly*. 1 *Blk. Com.* 88, (and *Christian's* notes.)

2. There was not sufficient proof of the usurious transaction. If the defendant had sued the plaintiff, he could not have recovered more than $150. Nor could *Baltzell* have recovered more than that sum. He stood in the same situation as the defendant did. There is nothing from which usury can be inferred. A man may purchase a note for less than the amount, and not be guilty of usury. But how much he might recover on it is another question.

3. The writ demands a debt of $450. The declaration has two counts, each for $450. Here then are demands for $900, and a recovery for only $450. *Compton vs. Smith*, *Yelv.* 5. The judgment is for $450 debt, and $900 damages and costs, to be released on payment of $450, with interest, &c. This judgment is erroneous, and is not embraced by the act of 1809, *ch.* 153, s. 4, which says that where a verdict shall be given, the court shall enter such a judgment upon the verdict as will carry an interest, &c. until payment of the *damages*, assessed by the jury giving such verdict. This is not the kind of action embraced by that act, being a *qui tam* action in which the state is concerned, and is in the nature of a prosecution on the part of the state; and here no damages were assessed by the jury—they merely find that the defendant owed the debt demanded.

JUDGMENT REVERSED.

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Williams vs Trustees, &c.

WILLIAMS'S Lessee vs. THE TRUSTEES OF THE POOR, &c.

APPEAL from *Anne Arundel* County Court. Ejectment for *Williams's Purchase*. The defendants (the appellees) took defence for *Norwood's Beale*, on the plots made in the cause.

A tract of land called *N. B.* described in a grant to run E. and by S 8 perches, to the head of *D's* creek, and running down with the said creek the following courses, *N"* &c. *seven courses*, "to a point at the mouth of a cove, thence N 39° E 26 perches, the point of another cove, thence with the said cove W N W 24 ps. thence N 26° W 34 ps. cross the cove to the beginning of a tract of land called *G*, it also being a bounder of 60 acres of land called *D*, and running with the said 60 acres by a line drawn N. and by W 30 ps. still bounding with the said land by a line drawn W 166 ps. then E N E 204 ps. to the head of *N's* cove, then with a straight line to the first tree"—*Held*, that there being only one location on the plots of *D's* creek, and the letter *J* being located by the defendant as the head of *D's* creek, and not counterlocated by the plaintiff, the E and by S 8 perches course to the head of *D's* creek, must terminate at the head of that creek, as located on the plots; that from the head of that creek the true location is, according to the grant, the following courses:— running down and with the creek N &c. *seven courses*, to a point at the mouth of a cove, the cove and point to be ascertained by the jury, thence as expressed in the grant N 39° E 26 ps. to the point of another cove, also to be ascertained by the jury, thence with the said cove W N W 24 ps. thence N 26° W 34 ps. across to the beginning tree of *G*, and a bounder of *D*. That if the beginning of *G*, and the bounder of *D*, cannot be proved, or if no such tracts can be proved, then the N 26° W 34 ps. course is to run across the said cove to the end of the said line, and then to run the several courses mentioned in the grant, without regarding the calls *G* and *D*. That it is the province of the jury to ascertain according to the proof, the points and coves called for, there being no particular designation contained in the grant of the coves, or of the points of the coves called for.

1. The plaintiff at the trial offered in evidence the patent of *Williams's Purchase*, the land mentioned in the declaration, granted to the lessor of the plaintiff on the 6th of May 1800, whereby it is described as lying "adjoining and between the tract of land called *Norwood's Beale*, and a creek called *Dorsey's* creek, beginning for the same at the edge of a cove leading out of the said creek, and at the end of 8 ps. on the N 25° E 12 ps. course of *Norwood's Beale*, (as corrected with an allowance of three degrees 45 minutes for variation.) the same being the 9th course of said land from where it calls to a marked locust post, it being a bounder of the land called *Sandgate*, and from thence running with said line, (as corrected with the said allowance for variation,) N 21° 15′ E 4 ps. to the end thereof, still running with and bounding on said land as follows, to wit: S 73° 15′ W 56 ps. N 35° 15′ E 8 ps. N 71° 15′ W 24 ps. thence N 74° E 144 ps. thence S 29° 45′ E 54 ps. to the mouth of a cove that leads out of *Dorsey's* creek, from thence up and bounding on and with the meanders of the said creek, the several following courses and distances, to wit: S 30° 30′ E 6 ps. S 25° W 5 ps. S 56° 45′ W 10 ps. S 10° 45′ W 10 ps. N 81° W 6 ps. to the mouth of a cove, then up and bounding on and with the meanders of said cove these several following courses and distances, to wit: N 57° 15′ W 12 ps. S 83° 45′ W 7 ps. S 88° 30′ W 10 ps. N 46° W 10 ps. S 58° 15′ W 3 ps. S 79° 30′ W 8 ps. N 85° 45′ W 14 ps. N 71° 45′ W 10 ps. to the first beginning." And also proved that the same was truly located on the plots; and offered in evidence the plots and explanations by him made. He then gave in evidence the patent of *Norwood's Beale*, granted to *John Beale* on the 2d of May 1719, (being a resurvey on *Norwood*, granted to *John Norwood* the 8th of February 1658; *The Intacke*, granted to *John Norwood* the 18th of January 1659; *Norwood's Recovery*, granted to *Andrew Norwood* the 10th of June 1686; and *Proctor's Chance*, granted to *Robert Proctor* the 28th of June 1680; and also a certain tract of escheat land called *Gattenby*, granted to *Thomas Gates* the 7th of February 1658.) "Beginning at a young bounded locust, standing by Severn river, on the S side of the said river, and on the N side of a cove called *Norwood's* cove, at the mouth of the said cove, and bounding on the said river, lying up with the following courses, viz. N" &c. "to the mouth of *Norwood's* creek, thence bounding on the

said creek and running therewith to the head thereof, by the several following courses, viz. S" &c. "to the head of a cove, then N" &c. "up the cove to a marked poplar, marked I H, for the governor, thence N" &c. "to the Rockey Neck Cove, then N," &c. &c. "across the cove, then N," &c. "to the spot where the original bounded pine of the land called *Norwood* stood, mentioned in the original certificate to stand at the head of the creek, then S," &c. "to a marked locust post, being a bounder of the land called *Sandgate*, thence E 36 ps. to a bounded white oak called *Todd's* oak, thence with *Todd's Range* S 74½° E 224 ps. to a stump on the S side of a branch, then running across the branch N 43° E 14 ps. then E & by S 8 ps. to the head of *Dorsey's* creek, and running down with the said creek the following courses, N 56° E 76 ps. then N 81° E 34 ps. then N 31° E 42 ps. then N 64° W 54 ps. then N 25° E 12 ps. then S 77° W 78 ps. then S 49° E 14 ps. to a point at the mouth of a cove, thence N 39° E 26 ps. to the point of another cove, thence with the said cove, W N W 24 ps. thence N 26° W 34 ps. cross the cove, to the beginning of the said tract of land called *Gattenby*, it also being a bounder of 60 acres of land called *Dorsey*, and running with the said 60 acres by a line drawn N and by W 30 ps. still bounding with the said land by a line drawn W 166 ps. then E N E 204 ps. to the head of *Norwood's* cove, then with a straight line to the first tree." And the plaintiff contended, that the said resurvey was truly located by him. The defendants then also offered in evidence the said patent of *Norwood's Beale*, and insisted that the same was truly located by them under the leave to add and amend, and the plots made out to September term 1812. They also offered in evidence, the patents of *Gattenby*, *Dorsey* and *Norwood*, viz. *Dorsey* surveyed 27th August 1668, and granted the 4th of September 1668, to *Edward Dorsey*, "lying on the S side of *Ann Arundel* river, and on a creek called *Dorsey's* creek, beginning at a bounded pine upon a point, and running up the said river for the length of 120 ps. to a cove called *Freeman's* cove, then up the said cove to the line of the land of Capt. *John Norwood*, then by the said *Norwood's* line S W for the length of 204 ps. to a bounded red oak in the said *Norwood's* line, then bounding on the line of a parcel of land formerly laid out for *Thomas Gates*, to the said creek, then bounding on the said creek to the first bounded tree, containing 60 acres," &c. *Gattenby*, granted to *Thomas Gates* on the 7th of February 1658, "lying on the W side of *Chesapeake* bay, and on the S side of a river in the said bay called *Severn* river, and on the N side of a creek in the said river called *Dorsey's* creek, beginning at a pine tree by the creek side, the said pine being the bound of 10 acres formerly laid out to the said *Gates*, running N and by W for breadth, by the clear ground side, 30 ps. and W 7 ps. to a marked oak, then running W for length 105 ps. unto the land lately laid out unto *John Norwood*, and W

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S W by the said land 85 ps. unto a marked oak, bounding on the W by a line drawn S from the said oak 100 ps. to a marked oak by the head of a branch, on the S by a line drawn E from the said oak 45 ps. and E N E 35 ps. and E 70 ps. to a marked oak by the said creek, on the E by the said creek; on the N by the first W line and *Norwood's* land, containing and now laid out for 100¼ acres," &c. *Norwood*, granted to *John Norwood* on the 8th of February 1658, "lying on the W side of *Chesapeake* bay, and on the S side of a river in the said bay called *Severn* river, beginning at a marked oak by a cove side called *Norwood's* cove, running N W up the river for breadth 150 ps. to a creek called *Norwood's* creek, bounding on the N by the said creek, running S W and by W for length 340 ps. to a marked pine by the creek side, on the W by a line drawn S and by E from the said pine 150 ps. to a marked oak; on the S by a line drawn N E and by E from the said oak 160 ps. and by a line drawn E from the end of the N E and by E line 16 ps. and by a line drawn E N E from the end of the E line unto the land formerly laid out unto *Nicholas Wyatt*, and by the said land unto *Norwood's* cove; on the E by the said cove and river, containing and now laid out for 230 acres," &c. And contended that the same were truly located by them on the plots in this cause. The plaintiff then prayed the opinion of the court to the jury, that he being admitted to have supported the title and location of his pretensions, is entitled to recover, unless the defendants by legal evidence can prove the true location of elder tracts, which take away the same; and that to justify the jury to gratify the calls in the elder certificate, by the defendants offered in evidence, proof must be given to satisfy the jury that the same are truly located on the plots. This direction the court [*Chase*, Ch. J. and *Ridgely*, A. J.] refused to give; but were of opinion, and so directed the jury, that there being only one location of *Dorsey's* creek, and the letter I being located by the defendants as the head of *Dorsey's* creek, and not counterlocated by the plaintiff, that the E. and by S 8 perches course to the head of *Dorsey's* creek must terminate at the head of that creek located on the plots; that from the head of that creek the true location is according to the said certificate, the following courses—running down and with the said creek N 56° E 76 ps. then N 80° E 34 ps. then N 31° E 42 ps. then N 64° W 54 ps. then N 25° E 12 ps. then S 77° W 78 ps. then S 49° E 14 ps. to a point at the mouth of a cove, the said cove and point to be ascertained by the jury, thence as expressed in the said certificate N 39° E 26 ps. to the point of another cove, also to be ascertained by the jury, thence with the said cove W N W 24 ps. thence N 26° W 34 ps. across the cove, to the beginning of the tract of land called *Gattenby*, and a bounder of the land called *Dorsey*. And the court were also of opinion, that if the beginning of said tracts called *Gattenby*, and the bounder of *Dorsey*, cannot be proved, or if no such tracts can be proved, that the N 26° W 34 ps.

course is to run across the said cove, and to the end of the said line, and then to run the several courses mentioned in the certificate, without regarding the calls to the said tracts of land called *Gattenby* and *Dorsey*. The plaintiff excepted. 1816. Williams vs Trustees &c.

2. The plaintiff further prayed the opinion of the court to the jury, that if the jury do not from the evidence, find that the beginning of *Gattenby* is at black L, that then they are not at liberty to run the line of *Norwood's Beale*, which calls to run to the beginning of *Gattenby*, course and distance—The defendants having given no location on the plots in the cause to warrant such location. The court refused to give this direction, but were of opinion, that if the beginning of *Gattenby* and the bounder of *Dorsey* cannot be found, or if such tracts cannot be proved, that the W 34 ps. course is to run across the said cove, and to the end of the said line, and then to run the several courses mentioned in the certificate, without regarding the calls in *Gattenby* and *Dorsey*. The plaintiff excepted.

3. The plaintiff then prayed the opinion of the court to the jury, that as the letter W on the plots is located by the defendants on the point of the second cove called for, and no other location is given thereof, that the jury must find that to be the point to which they must go in running from a point at the mouth of a cove, N 39° E 26 ps. and from said point W they must run the next course. But the court refused to give this opinion, being of opinion, that it is the province of the jury to ascertain according to the proof the cove and the point of the cove called for, there being no particular designation contained in the certificate of the cove, or the point of the cove called for. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, EARLE, and MARTIN, J.

Shaaff and *Magruder*, for the Appellant. Three questions arise on the record—1. Is not the junior grant to stand unless there is proof that elder surveys include the land? 2. Can the defendants give a different termination than that called for in their locations on the plots? 3. Are they not bound by their location of a point if they do not counterlocate it?

1. The plaintiff's location is admitted to be correct, and his title is also admitted. To bar him an attempt is made to take away the land by locating other lands. If the defendants' locations are correct, then the plaintiff's land is swallowed up. *Norwood's Beale* is the subject of controversy, and if it is correctly located it takes away the plaintiff's land. That land is described to run "E and by S 8 ps. to the head of *Dorsey's* creek," &c. then, &c. "to the

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beginning of *Gattenby*," &c. *Gattenby*, as located by the defendants, begins at L on the plots. This is counterlocated by the plaintiff so as to put the defendants on the proof of their location. Before the grant to the lessor of the plaintiff can be set aside, the defendants are bound to prove their locations. Where there are calls in elder surveys there must be proof to show that the lands are truly located. *Norwood's Beale* has calls, and before the defendants can locate that land to those calls, there must be proof of them. The court below, however, directed the jury to run to those calls when there was no proof of such calls.

2. Suppose a location is made on the plots running to a certain point, and there is no other location given, shall the party claim a different location than that which he has made? The defendants should have located as they expected to prove. If they could not prove the call, then they should have located course and distance. *Hammond et al. Lessee vs. Norris*, 2 *Harr. & Johns.* 148. But the court below decided, that though the defendants claim to run to the call, yet the jury might run the course and distance, though not located or insisted on by the defendants. This was giving the defendants quite a new defence, and different from what they claimed. It is contended that the defendants were controled by their own location at W on the plots, in the same manner as the plaintiff was confined to his location at I. The certificate could not designate it except by giving it a name. The defendants having located the cove at W, and no other being made by them, they are bound by it.

Stephen, for the Appellees. The defendants below took defence for *Norwood's Beale*. There was no controversy in the location of the land until it came to the head of *Dorsey's* creek, which is located by both parties at the letter I on the plots; of course the head of *Dorsey's* creek is admitted to be at I. The court below, in directing the jury to run "down and with the creek," had a right to do so, it being a matter of law for their decision. But where the coves were situated, was matter of fact for the jury. If there is but one location, yet it is competent for the jury to give less than is claimed, and otherwise than claimed and located.

The Court concurred in the opinions of the County Court as given in each of the bills of exceptions.

Buchanan, J. dissented from that given in the *first* bill of exceptions.

JUDGMENT AFFIRMED.

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A judgment in ejectment was entered for the plaintiff at September term 1807, with an agreement that execution should not issue thereon before the decision of the court of appeals in the case of D against P, and that if that judgment was reversed, then the above judgment was to be struck out. On this judgment the defendant brought a writ of error on the 3d of July 1811, and the judgment referred to was *affirmed* in the court of appeals at December term 1813——*Held*, that the writ of error be *quashed*, it having been sued out after three years had elapsed from the time of the rendition of the judgment

S D, a tenant in tail of a tract of land, in May 1777 sold it to J D, and put him in possession, giving him a bond of conveyance. In September 1777 S D died, not having conveyed the land to J D. At the death of S D, his son E H D the heir in tail was seven years of age, and on the 8th of July 1805 he brought an action of ejectment to recover the land. J D and those claiming under him, had always, since May 1777, been in possession. *Quere*. Whether E H D, the issue intail, was not barred by the statute of limitations from recovering, as he did not enter or bring his ejectment either within 20 years after cause of action accrued, or 10 years after he arrived at the age of 21 years?

ERROR to *Anne-Arundel* County Court. Ejectment brought on the 8th of July 1805, for a tract of land called *Chew's Vineyard*. From the case stated it appears, that *Samuel Dorsey*, by the will of his father, was seized of an estate tail in the land in dispute, which is part of a tract called *Chew's Vineyard*. That being so seized, he, on the 25th of May 1777, entered into an agreement with Col. *John Dorsey* for the sale of it, and on that day gave his bond in the penalty of £3000, conditioned for the conveyance of the land to him, by metes and bounds. That *S. Dorsey* died in September 1777, not having conveyed according to his contract and bond. That before his death he had received from *J. Dorsey* the greatest part of the purchase money. That when *S. Dorsey* died, his son *Edward Hill Dorsey*, the lessor of the plaintiff, (the defendant in error,) was seven years old. That *J. Dorsey* on the 25th of January 1779, instituted a suit in chancery against *E. H. Dorsey*, the heir of *S. Dorsey*, and his mother *Margaret*, the administratrix on her husband's estate, to have a conveyance on payment of the arrearages of the purchase money. In which bill it is stated, and by the answer admitted, that such agreement was made and bond given. That on such bond being given, *J. Dorsey* entered upon and took possession of the property thus sold to him, with consent of *S. Dorsey*, the land being first surveyed for him, and found to contain 340 acres. That *J. Dorsey* had paid the greatest part of the purchase money in the lifetime of *S. Dorsey*. The case states further, that the chancellor decreed a conveyance of the land to be made to *J. Dorsey*. That *Margaret Dorsey*, in pursuance of said decree, on the 27th day of February 1779, executed to *J. Dorsey*, a conveyance according to the decree. That immediately thereon *J. Dorsey* entered into possession of the land, claiming the same under the said purchase, decree and deed. That on the 22d July 1779, *J. Dorsey*, for a valuable consideration, executed a deed for the same land to *Edward Dorsey*. That *Edward Dorsey* thereupon immediately entered into the said land, claiming the same by virtue of said deed, and that he continued in possession and seisin thereof till his death on the 24th March, 1799. That on his death the land descended to his children, *Mary Dorsey*, *Priscilla Dorsey*, *Caroline Dorsey*, *Hill Dorsey*, and *Hammond Dorsey*, and has since been in their possession That *Robert Dorsey*, the defendant, (now plaintiff in error,) is the guardian of those heirs, and was in possession of the said land, as their guardian. That *E. H. Dorsey*, the lessor of the plaintiff, was, when this suit was instituted, *thirty-two* years of age, and had not at any time before, applied to the court of chancery, or to any court of common law, for relief. Upon these facts the county court, at September term, 1807, gave judgment for the plaintiff for possession and costs. It was agreed

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between the parties that execution should not issue upon this judgment before the determination of the court of appeals, in the case of *Dorsey's lessee against Partridge* (3 *Harr. & Johns.* 302,) and that if the judgment in that case was reversed, then this judgment should be struck out. On the judgment in this case, the defendant afterwards, on the 3d of July 1811, sued out a writ of error returnable to this court.

The cause was argued at the last term before BUCHANAN, NICHOLSON, and EARLE, J. and reargued at the present term before the same Judges, and MARTIN J.

Martin, for the Plaintiff in error, contended. That *E. H. Dorsey*, the lessor of the plaintiff below, was barred by limitation from recovering, as he did not enter or bring his ejectment either within twenty years after cause of action accrued, or ten years after he arrived to the age of twenty-one years. *S. Dorsey* on the 20th of May 1777, sold the land to *J. Dorsey*, and gave him a bond of conveyance, on that day he put *J. Dorsey* in possession according to the contract. When *J. Dorsey* thus entered and took possession under the contract, he became tenant at will of the whole land sold to him, according to its metes and bounds; and remained tenant at will thereof until *S. Dorsey's* death in 1777, and thus long his possession was legal, as tenant at will. On the death of *S. Dorsey* in September 1777, the tenancy at will ceased, and his possession afterwards became a tenancy at sufferance, and was tortious. At the death of *S. Dorsey*, therefore, the right of action accrued to his heir, the lessor of the plaintiff below. From that time *J. Dorsey* became tenant at sufferance; from that time he, and those claiming under him, remained in possession of all the land in dispute, occupying it, taking the profits of it, and claiming the same under the contract made with *S. Dorsey*; *and S Dorsey* or *E. H. Dorsey*, or any person claiming for them, have not entered upon the land, or had possession of it, or of any part of it, since the 20th of May, 1777, to the present time. Thus admitting, that no right either of entry or possession, was obtained by the decree or conveyance under it, yet the plaintiff in error, and those under whom he claims, have had possession of the whole land in dispute, claiming the same from the 20th of May, 1777, (the time of the contract, and date of the bond,) to this time. That possession was rightful until the death of *S. Dorsey*, in September 1777, and from that time tortious and adverse; and from that period to the institution of this suit, on the 8th of July 1805, is nearly thirty years.

Pinkney, for the Defendant in error. The counsel for the plaintiff in error, having abandoned all claim of title to the land in dispute, under the decree of the Chancellor, and the deed of *Margaret Dorsey*, guardian of the defendant in error, the sole question remaining for the conside-

ration of the court is, Whether upon the case stated, the lessor of the plaintiff in the court below, is barred by the statute of limitations? If cases similarly circumstanced, and already decided in the general court, and affirmed in the court of appeals, are to form a rule of decision in this case, it is contended that the question has been already finally settled. It will be admitted, that whatever bars the right of entry, is a bar to the plaintiff's recovering in the present action, to support which he must show a right of entry either in himself or his ancestors, within twenty years. This is the general principle laid down in the books. But it is contended in this case, that *J. Dorsey* did not, in virtue of his contracts, the decree of the chancellor, or the deed of the guardian, gain any right of property to, or right of entry into, the land in dispute. The contract of purchase with *S. Dorsey*, the father, could confer no such right against the heirs in tail; the decree could confer no right; the deed of the guardian could confer no such right, and so have the court decided in the case of *Dorsey and Partridge*, and so it is believed have the plaintiff in error's counsel admitted in the present case. If then *J. Dorsey* gained no right of entry by the acts above stated, *E. H. Dorsey*, who is admitted to have been in the seizin and possession of the land at the time of the execution of the deed by his guardian, was not divested either of his right of entry or right of possession. The question then occurs, "What kind of possession must a person have who claims by possession alone, without showing any title," which is the case now before the court? The answer is, that the person so claiming by possession alone, must show an exclusive adverse possession by enclosures, and his claim cannot extend beyond his enclosures. In this case, no possession by enclosures has been stated, none has been admitted, no plot or survey locating the enclosures, or identifying the actual possession of the defendant, appear upon the record, nothing more is stated than the mere entry of *J. Dorsey* into the land, claiming the same under the purchase, decree and indenture. These acts did not exclude the rightful owner of the advantages arising from his general possession, nor did they operate in any manner in derogation of his rights, or his remedy by action. The case of *Davidson's Lessee vs. Beatty*, 3 *Harr. & M'Hen.* 596, 597, 618, 619, 621, fully establish the doctrine contended for. In that case there was an attachment and condemnation of the land in dispute, in virtue of which the defendant, and those under whom he claimed, entered on the premises. The condemnation took place in 1768, the suit in 1794, and there was no minority or other inability, intervening, as savings under the statute of *James*. In the above case, it is true, there was a qualified possession gained, but not such a possession as would confer any legal right whatever; it was only the possession of an intruder, who to avail himself of that possession, must show an exclusive adverse possession by enclosures. Although the

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land in that case was surveyed and laid out into lots by the defendant, and sold to sundry purchasers, yet the court decided that such acts did not amount to that kind of possession, in contemplation of law, as would bar the legal owner. There was an appeal in the above case, but it was never finally decided in the court of appeals. But the general court in 1803, made the same decision in the case of *Ringgold et al. lessee against Cheney*, which was affirmed in this court on argument. 2 *Harr. & Johns.* 87. Ever since those decisions so solemnly adjudged, upon argument by the most eminent counsel in the state, the point has been held to be finally settled.

Stephen, on the same side. The judgment rendered in this case was at September term 1807, and the present writ of error was sued out on that judgment on the 3d of July 1811. The judgment rendered in this case was on the same facts stated, as in the case of *Dorsey's Lessee vs. Partridge*; from the decision in that case an appeal was made, and the judgment of this court, it was expected, would have terminated the present contest. 3 *Harr. & Johns.* 302. The plaintiff in error in this case now relies solely on the act of limitations, a ground not taken in the court below. For there it must instantly have been abandoned, upon proof that the lessor of the plaintiff held the adjacent lands, and that fact appearing, the judgment of this court, in the case of *Ringgold vs. Cheney*, must have removed the bar by limitations. The writ of error here has been improperly and illegally sued out, and on motion must be quashed. Before the act of 1807, twenty years was the time limited for appealing or suing out a writ of error, from the judgment of a court of law; but by an act passed in that year, (*ch.* 151,) the time is reduced to three years. The language of the act is most clear and explicit. It is this: "No writ of error or appeal shall be prosecuted on any judgment rendered, or that shall be rendered, after three years shall have elapsed from the time of the rendition of such judgment." The judgment here was rendered in September 1807. The writ of error was not sued out until the 3d of July 1811, nearly four years after the date of the judgment. The act of 1807, passed the 20th of January 1808, subsequent to the judgment, but it embraces past as well as future judgments; of course the writ of error now before the court must be quashed, as not prosecuted in time, unless it falls within the operation of the proviso of the act, and is protected by it. But it is as evident that the proviso does not embrace it, as it is clear that if it did, yet the writ of error must be quashed, because not prosecuted within the time limited by the proviso or saving clause. The act of assembly, having reduced the period from twenty to three years, and being retrospective as well as prospective in its operation, the legislature thought proper to allow a time to appeal or sue out writs of error from judgments rendered within twenty

years, but more than three years from the date of such judgments, and therefore provides for such cases as would have been barred by three years, and allows to them 18 months to be computed from the passage of the act. The case before the court is not within the proviso, for it is not one of those which would have been barred by the act, if the proviso had not been made. For only a few months had elapsed from the time of the rendition of the judgment, before the passage of the act. Perhaps it may be urged, that the proviso in its spirit, though not in its language, should embrace all judgments rendered prior to the passage of the act, otherwise this consequence might ensue, that judgments, having only a few months, nay days, to complete the three years, would be barred at the expiration of that time, a hardship which the legislature could never have intended. Such a course of reasoning is fair, and the interpretation might be adopted, as proceeding out of the spirit, though manifestly inconsistent with the explicit letter of the law. Even such a benign and liberal interpretation of the law would not, however, place the cause of the plaintiff in error in a better situation. All he can ask is, that either his case may or may not be brought within the operation of the proviso. If it is not, then clearly the enacting clause is against him; if it is, then as the proviso allows to no cases more than eighteen calendar months, to be computed from the passage of the act; and as more than three years have expired after the act, before the writ of error was brought, he is too late in bringing his case before this court, and of course, in every view of the subject, the decision must be to quash the writ of error. If the plaintiff in error should attempt to avail himself of the agreement entered into in the court below, at the time of the rendition of the judgment, which was that execution should not issue before the determination of this court in the case of *Dorsey's lessee vs. Partridge*, and the decision of this court in that case should be binding and decisive in this case, it is answered that this agreement is no bar to the bringing a writ of error immediately thereafter, if the defendant had been so disposed; and of course, it cannot have the effect of taking his case out of the regular operation of the law.

Martin, in reply. It has been said "that *J. Dorsey* did not, either by the *contracts*, the *decree*, or the *deed of the guardian*, gain any *right of entry* or right of *property* in the land in dispute." It is admitted for argument sake, that *neither the decree* of the chancellor, nor the *deed of the guardian*, gave him a right of entry or a right of property in the land. But there is no principle more clear, than that by *the contract*, *J. Dorsey* did obtain a *right of entry* into the whole lands contracted for; for *S. Dorsey* had a right to make that contract, which gave *J. Dorsey* a right to enter into the lands agreeably to the contract; and by that entry, *J. Dorsey* became a tenant at will. And he,

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and those who claim under him, having continued that possession ever since, which though rightful while *S. Dorsey* lived, yet having been wrongful and adverse since his death, became at the end of twenty years after *S. Dorsey's* death, and ten years after the lessor of the plaintiff came of age, a bar to his recovery by ejectment, it being a bar to his entry. But it is idle to say "that neither the contracts, decree of the chancellor, nor deed of the guardian, gave a *right* of entry or property, if in *reality an actual entry was made upon them.*" For if there was not a *right of entry*, then the *actual entry* was *tortious* and *adverse*, which is sufficient for our purpose, as from that moment the cause of action accrued. And *it is admitted* that such actual entry was made by *J. Dorsey* into the lands in dispute, claiming the same under the contract, and also under the decree and deed. And unless the lessor of the plaintiff entered or brought his ejectment within 20 years after *J. Dorsey* had thus entered, or within 10 years after his arrival to the age of 21 years, he is barred by limitations. It has also been said, "that it is admitted *E. H. Dorsey* was in the seizin and possession of the land in dispute at the time the guardian executed the deed." There is no such admission, nor was it a fact; on the contrary, it appears from the case stated, that *J. Dorsey*, and those claiming under him, was in possession, and have continued in possession, from the day the bond was given, until the day the case was stated, without any interruption. Nor can there be even an inference from the guardian's executing the deed, that the lessor of the plaintiff, or his guardian, was in possession at the time of executing the deed. For the deed could only operate as a release, the proceedings stating *J. Dorsey* to be in *possession under the contract.* The deed requisite to be given could only be a deed operating as a deed of release or confirmation—a deed to a person for land in his possession, to confirm and make good his title by transferring the right of property to him who had the possession. The counsel, it is presumed, has been led into this mistake by observing the admission that *Edward Dorsey*, (not *Edward Hill Dorsey*,) to whom *J. Dorsey* conveyed, was *seized and possessed*, under the conveyance made to him by *J. Dorsey.* It has also been observed, "if cases similarly circumstanced, and already decided in the general court, and affirmed in the court of appeals, are to form a rule of decision in this case, it will be contended that the question has been already finally settled." No decision either in the general court or court of appeals, can be shown, that militates against the principle contended for on the part of the plaintiff in error. Let us examine the two cases to which the court has been referred.

The first is *Davidson's lessee vs. Beatty.* In this case the *defendant* endeavoured to make *title*, for which purpose he showed that the land in dispute had been attached and condemned at the suit of *William Black*, and that under the condemnation *Black* had conveyed the land con-

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demned, to *Beatty*, but the court determined that these facts proved no title in the defendant, for that by the attachment and condemnation, *Black* gained neither right of property, nor right of entry or possession. The defendant, thus failing to defend himself by title, endeavoured to set up a defence under the statute of *James*. by limitations; and for this purpose he gave in evidence, that under the attachment and condemnation, and the conveyance under the condemnation, from *Black* to *Beatty*, *Beatty* had entered into the land in dispute, had made a survey of it, had the the same laid off as a town into lots with streets, lanes and alleys, and had done this more than 20 years before. *To get clear of the effect of this possession, the plaintiff gave in evidence*, that at the time of the attachment and condemnation, and of the execution of the deed, as also of the entry made by *Beatty* into the land in dispute, and of the laying the same off into lots, streets, lanes and alleys, &c. the owner of the land, Mr. *Gordon*, was actually residing on it, and continued to reside thereon, claiming the same as his own, and contended, that as he was in actual possession, though *Beatty* had also actual possession, yet the possession should be considered as remaining in him who had the right to the extent of his right, and that he could not be prejudiced by the possession of *Beatty*, except so far as *Beatty* could show an exclusive unmixed possession of any part separated by enclosures from the possession of *Gordon*, who had the title and right. The opinion of the court was, that the owner of the property in dispute, *being actually in possession, residing thereon, claiming title thereto*, he could not be prejudiced by the possession of *Beatty*, or those claiming under him, unless for such part as he had held by actual enclosure, separated from the rest. To this opinion there was no exception taken, as appears by examining the papers in the cause and the records, nor was there any appeal on the part of *Beatty;* therefore the court of appeals did not in that case decide upon the opinion. This observation is not made to lessen the authority of that opinion, for its correctness is acknowledged in the fullest manner. But it in no respect operates to the prejudice of the plaintiff in error. The case of *Ringgold* and others lessee, against *Cheney*, was an ejectment for a tract of land called *The Number of Two*. Here, as in the case of *Davidson's lessee vs. Beatty*, the defendant, *Cheney*, having shown that he and his father had actually entered into *Cheney's Delight*, (for which he took defence) and claimed the same according to the lines of that survey, the plaintiff, to get clear of the effect of such entry and possession of the defendant, gave in evidence, that *Jordan* obtained a patent for *The Number of Two*, which included *Cheney's Delight*, and derived a title to the same down to the lessors of the plaintiff, showing also the entry and possession of the patentee himself, and of the entry of all those claiming under him, into *The Number of Two*, and their possession of part of *The Number of Two*, with a constant claim of the whole tract, according to their rights

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respectively; thereby reducing the defendant to show that he had held by actual enclosures, separating the part he held from the rest of the tract, a kind of possession absolutely necessary to bar the plaintiff, who had actual possession of part, claiming title to the whole. According to the rule of law laid down in *Coke Littleton*, section 701, page 368, *a*, "Where A is seized of a *Mese*, and F, who hath no right to enter, entereth into the said *Mese*, claiming the same to hold to him and his heirs, but the said A is then *continually abiding* in the said *Mese*, in this case the possession of the freehold shall be always adjudged to A, and not to F, because in such case, *where two be in one house or other tenements*, and the one claimeth by one title, and the other by another title, *the law shall adjudge him in possession who hath the right to have the possession of the same tenements*." But suppose in *Davidson's lessee vs. Beatty*, no evidence had been given that *Gordon* had been residing on, or in actual possession of the land in dispute, at the time when *Beatty* entered under the deed, or at any time after, before bringing his suit. Or, in *Ringgold's* lessee *vs. Cheney*, the evidence had only been given that *The Number of Two* had been granted to *Jordan*, and included within its limits *Cheney's Delight*, without offering any proof that either *Jordan*, or any of those who claimed under him, had ever entered upon *The Number of Two*, or had ever been in possession of it after *Cheney's* certificate, and the entry and possession under it. In each case the defendants must have defeated the plaintiffs, without giving any evidence of possession by actual enclosures, as in that case there would have been no evidence of a mixed possession; and it is where there is a mixed possession, where the same thing is actually possessed by two persons, one possessing rightfully, and the other tortiously, that a possession by actual enclosures, separating the part tortiously possessed from the other part, is necessary. It will now be shown that adverse possession alone is sufficient, if the person who has the right of possession doth not enter within twenty years.

1. If tenant in tail conveys in fee, and the grantee enters into possession of the premises granted, he is legally possessed of the tenements granted, and to every part thereof as described in the grant, until the death of the grantee. Upon his death the heir in tail has immediately the right of possession, but he has no actual possession until he enters into the land conveyed by his ancestor. And if the grantee continues in possession after the death of the grantor, his possession is tortious; and if it continues 20 years undisturbed, the heir in tail, not having made an actual entry upon him, such heir cannot recover the land by ejectment. 3 *Blk. Com.* 171, 172, 174, 175.

2. If tenant in fee simple executes a lease of the lands to A for the life of B, and A enters into the land, he becomes legally possessed of it, and of every part of it, according to the description in the lease, as long as B lives,

but if he continues in possession after B's death, his possession becomes tortious, and if the lessor doth not enter upon him within 20 years after the death of B, he cannot recover by ejectment. 3 *Blk. Com.* 169, 174, 175.

3. So if a man possessed of a tract of land in fee simple, leases the same for life, and the lessee enters upon the land leased, he thereby becomes legally possessed of the land leased, and of every part of it, to its utmost extent; and his possession, or the possession of any one claiming under him, is lawful during the lessee's life; but if on his death the heir at law of the lessee, or even a stranger, being in possession of the property leased, continues in possession, that possession is tortious, and if continued more than 20 years, without an actual entry being made by the lessor, an action of ejectment cannot be supported. 3 *Blk. Com.* 169, 174, 175.

4. In like manner, if a man has a lease for a year, and after the year is expired he continues to hold the premises without any fresh lease from the owner of the estate, or if a person is tenant at will, and the lessor dies, by which the estate at will is determined, but the tenant at will continues possession; in either case the tenant becomes a tenant by sufferance, and his possession is in such case tortious; this estate can be defeated by actual entry, but unless such entry is made within 20 years, the owner cannot recover by ejectment. 2 *Blk. Com.* 150. *Co. Lit.* 57 *b.* 3 *Blk. Com.* 174, 175. If a man is entitled to a tract of land, for instance *Black Acre*, and dies seized thereof, his heir at law not being resident thereon, though he has the right of possession, he is not considered in possession until he actually enters thereon; and if after the death of the ancestor, and before the entry of the heir, a stranger enters upon *Black Acre*, claiming title to that tract, he thereby obtains possession of it, which though tortious, yet if the heir doth not make an actual entry upon it within 20 years thereafter, prevents the heir recovering by ejectment, and such tortious tenant is called a tenant by abatement. 3 *Blk. Com.* 167, 168, 174, 175. Nay, where a person enters under a conveyance claiming title, though the conveyance is void, and gives neither right of entry nor possession, yet if the person doth actually enter under such conveyance, claiming title, and continues that possession for 20 years undisturbed, he can bar the recovery in ejectment by his possession. As for instance, if alienee enters claiming title under the conveyance, though his entry and possession is tortious, yet if the owner of the land doth not enter within 20 years after the tortious entry, or within ten years after the disability removed, he cannot recover in ejectment. 3 *Blk. Com.* 173, 174, 175. In all the cases above stated, it appears from 2 *Blk. Com.* 150, 151, and 3 *Blk. Com.* 167 to 174, inclusive, all persons thus holding after their rightful possession terminates, or entering illegally, while the possession is vacant, as after the death of the ancestor before the heir actually enters—or in case of

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death of tenant for life, &c. before heir in remainder or reversion actually enters, are possessors of the property by wrong. And though this wrongful possession may be defeated by a formal and peaceable entry made actually by the right owner of the land. 3 *Blk. Com.* 174, 175. Which entry, by the by, may be made where the conveyance has proceeded from the tenant in tail, according to the decisions in *Maryland*, and also in those cases of injury called *deforcements*, as well as in other cases; yet that remedy must be made use of within 20 years after the cause of action accrued, that is within 20 years after the tortious possession began. And in all cases where a tenant has been in possession rightfully of any tract of land, by metes and bounds, and continues his possession after his rightful possession is ended, his tortious possession is considered as extendingto the same tract by the same metes and bounds, and so it has been determined in this state; for where the heir in tail has brought suits against tenants to whom his ancestor has sold property which was entailed, and he hath not brought his suit within 20 years against the tenant, he has been barred from recovering any part of the property sold within its metes and bounds, no matter whether the tenant held the land by actual enclosure, or without. So also if the ancestor dies seized of *Black Acre*, and before the heir enters thereon, so that he is not in possession thereof, or any part, and the possession is vacant to its whole extent, if a stranger enters into *Black Acre*, claiming that tract of land, he becomes wrongfully possessed, not merely of the spot on which he stands, but of the whole tract, no matter whether inclosed or uninclosed, and if he remains in possession more than 20 years, the owner cannot recover, whether such stranger be possessed by actual enclosure or not, *and in all other cases*, where a stranger enters upon any other tract, where the possession is vacant, or if the possession is not vacant, where the stranger expels the owner from the entire possession of the whole tract, and afterwards continues in possession thereof, claiming the said tract. A man may have a right to convey or to devise lands without having actual possession, but he must actually enter before he can bring trespass for injuries done to such lands. *Plowden*, 142. 6 *Bacon's Ab.* 566. 2 *Esp. Dig.* 290, (8.) He must have the *possession in fact* to bring trespass. 6 *Bacon's Ab.* 566. If lessee holds over his term, the owner must actually enter before he can bring trespass. 5 *Mod.* 384. And the entry must be *animo clamandi*. 6 *Mod.* 44. The only difference between trespass and ejectment, is that to bring ejectment, the entry laid in the declaration is sufficient, without actual entry, it being confessed; provided the plaintiff had a right to make an actual entry, that is to say, if the tortious possession had not continued for 20 years. Now to apply these observations to the case before the court. J. *Dorsey* entered into the land in dispute under the contract, and was actually possessed of it—He and those claiming under him have actually possessed, claimed, occupied and en-

joyed the land ever since. The possession was rightful until *S. Dorsey* died in September 1777. From that time the possession became tortious, and the cause of action commenced; from that time, to the commencement of this action, was 28 years. It is not found that *S. Dorsey*, or the lessor of the plaintiff, or any person on his behalf, has ever entered upon or been in actual possession of the land at any time since the death of *S. Dorsey*, nor have they been in fact. There is no *mixed possession* admitted, nor has there been any *mixed possession* in truth. According to the authorities cited, *J. Dorsey*, immediately upon the death of *S. Dorsey*, became a tenant at sufferance. On the 25th of July 1779, he conveyed the land in dispute, by the same metes and bounds, to *Edward Dorsey*, and it is admitted, "that immediately after, *Edward Dorsey entered into the said lands, claiming the same under and by virtue of that indenture, and continued in the seisin and possession of the same till his death;* and that from that time the land in dispute had been in possession of his heirs, to whom *Robert Dorsey* is guardian." Now the deed executed by *J. Dorsey*, (who was then tenant by sufferance,) to *Edward Dorsey*, and *Edward's* entry and possession and seisin under it, amounted to a disseisin. And even counting from the deed to *Edward Dorsey*, more than twenty-six years had elapsed before the lessor of the plaintiff brought his suit. Thus at law he is barred by limitation, not having brought the action within 20 years after cause accrued, or within 10 years after he was free from all disabilities. In 2 *Blk. Com* 195 to 199, it is stated, that one person may have the actual possession without right, which he calls a mere *naked possession*. Another may have the *right of possession*; another may have *the right of property*. But a complete title to lands comprises the right of possession, with the right of property, to which *the actual possession must be united*. Upon the death of *S. Dorsey*, *J. Dorsey* had, what is called, a *naked possession*, which, though the rightful owner may put an end to by entry, yet, till such entry is made, is *prima facie evidence of a legal title*; and which by length of time, and negligence of him who had right, may become a perfect and indefeasible title. *Ibid* 195, 196. And which, by the neglect of the entry of the lessor of the plaintiff within 20 years from the time *J. Dorsey* acquired that naked possession, or 10 years after he came of age, took away from the lessor of the plaintiff *the right of possession*, and the remedy by ejectment. And by a still longer neglect of 60 years, it would have barred a *writ of right*, and given him a perfect and indefeasible title.

It has been alleged in argument by one of the counsel, "that the plaintiff in error relies in this court on the act of limitations, a ground not taken in the court below, for there it must instantly have been abandoned, upon proof that the lessor of the plaintiff held the adjacent lands; and that fact appearing, the judgment of this court, in the case

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of *Ringgold against Cheney*, must have removed the bar by limitations." It may be answered, that the objection could not have been removed in the manner the counsel presumes it might. He is totally mistaken in the fact. It is well known that *S. Dorsey* was not, at the time of his death, possessed of one foot of land adjacent to the lands in dispute, nor did the lessor of the plaintiff, or any person holding for him, possess one foot of land adjacent to these lands at the time of his father's death, or at any time after and before the bringing this suit.

But the counsel for the defendant in error hath taken a new ground. He insists that the court cannot go into an investigation of the merits, because the writ of error was not sued out in time; that the plaintiff in error is barred of relief, if otherwise entitled, by limitation; and he relies on the act of 1807, *ch.* 151. It is believed, however, that the plaintiff in error cannot be affected by that act. 1. Because, when the judgment was entered, it was expressly upon the terms that no execution should be issued before the decision in the case then depending in this court between *Dorsey vs. Partridge*, and if that judgment be reversed, *this judgment was to be struck out.* Until that decision, therefore, this judgment could only be considered *interlocutory*—it did not become, nor could it be considered, a final judgment, until the decision in the case of *Dorsey vs. Partridge.* If that decision had been against *Dorsey*, then it would have settled this case, because *Dorsey*, the present lessor of the plaintiff, had no other title here than he had there. But if decided in *Dorsey's* favour, it did not, nor was it meant, that though the judgment was to become final, the plaintiff in error in this case was not to have a right to appeal or sue out writ of error, because he might have, as is the case, a defence which *Partridge* had not. 2. Because every writ of error is a suit or action, and the defendant cannot, in any action or suit in law or equity, take advantage of limitations, unless he pleads it in time. In the case of the present writ of error, the defendant in error has pleaded the general issue, on which issue is joined. Whether there is error or not is therefore the sole issue before this court. If then the defendant in error could have had any benefit of limitations, he has lost such benefit by having omitted to plead that defence specially.

The court will not quash a writ of error on motion, though it appears to be brought *twenty-nine* years after the judgment, and the statute restrains the party to *twenty* years, because if they did, it would deprive the plaintiff in error of the benefit of replying the exceptions in the statute. *Higgs vs. Evans*, 2 *Stra.* 887. *Sellon's Pr.* 406. *Tidd's Pr.* 1065.

The Court quashed the writ of error, it having been sued out after three years had elapsed from the time of the rendition of the judgment.

WRIT OF ERROR QUASHED.

MICHAEL *vs.* SCHROEDER, *et al.*

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Michael vs Schroeder

Allegations by a creditor against a petitioner for the benefit of the insolvent laws, cannot be removed, under a suggestion, to an adjoining county for trial.

APPEAL from *Baltimore* County Court. The appellant having petitioned for the benefit of the insolvent laws, the appellees, his creditors, exhibited to the court certain allegations against his being discharged under those laws, praying that issues in a summary way, without the form of an action, might be directed to determine the truth of the allegations. The petitioner made a suggestion, supported by affidavit, that he could not have a fair and impartial trial in that court, and prayed that the record of the proceedings might be removed to *Harford* county court, to be there heard and determined. But the Court, [*Nicholson*, Ch. J. and *Bland*, A. J.] being divided in opinion, did not give the direction and order as prayed. The petitioner excepted, and appealed to this court, where the case was argued before BUCHANAN, EARLE, JOHNSON and MARTIN, J. by

Brice, for the Appellant, and by
W. Dorsey for Appellee.

JUDGMENT AFFIRMED.

LEVY COURT OF BALTIMORE COUNTY'S Lessee *vs.* GWYNN.

JUNE

Commissioners were appointed by the act of 1768, *ch.* 14, to lay out not more than one acre and an half of ground in *Baltimore*, and to agree with the owner thereof for the purchase, or if the owner would not or could not legally contract with them, they were authorized to issue their warrant to the sheriff for summoning a jury, not less than 12 freeholders, to appear before them at, &c. on, &c. to inquire to whom the land belonged, the value thereof, and what damages the owner would sustain by being deprived thereof. The sum assessed to be paid by the commissioners, and the payment for the land, to invest the justices of *Baltimore* county, and their successors, with an estate in fee simple for the use of the county. The commissioners were to cause the land to be laid out with boundaries by the surveyor, and a certificate thereof to be entered on the county records. They were then to contract for building on the land a court-house and a prison, with a prison yard, and other conveniences. The commissioners returned an inquisition, taken before them, also a plot and explanation thereof, by which it appeared, that one acre and a half and 67 square perches, were laid out. It did not appear that any attempt was made to agree with the owner of the land, nor that any warrant issued to summon a jury. The inquisition did not show that the jurors were freeholders. The jury did not find who was the owner of the whole land, and what damages would be sustained. They found the owner and value as to part only. There were no boundaries fixed to the land surveyed, and it did not appear that the land condemned was the land surveyed. The survey was not made by the surveyor, but by a deputy. The proceedings were lodged in the office of the clerk of the county court, but not recorded. Evidence was given as to the signatures of the jurors, and that they were all freeholders; one of the commissioners, (the others being dead,) proved that they met under the act in order to execute it, and did, as he believed, proceed regularly in the execution thereof, but he had no particular recollection of the acts done by them, further than his knowledge of his and their signatures, and of the signatures of some of the jurors. A court-house and prison were erected on part of the ground, but not on that in dispute. The inquisition and plot, &c. were recorded in 1796, for safe keeping, by the clerk of the county court, it having remained in his office unrecorded until then. On an ejectment brought by the levy court to recover a part of the ground so condemned—*Held*, that the said proceedings were not evidence to prove that the premises, mentioned in the declaration, and described in such proceedings, were vested in the justices of *Baltimore* county for the time being, and their successors, in fee simple, for the use of the county, pursuant to the said act of assembly.

At the trial the plaintiff read in evidence the following agreement between the parties: "It is admitted, that the lot of ground described in the declaration is included

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within the lines of the ground surveyed and laid out for the purpose of erecting thereon a court-house and prison for *Baltimore* county, under the direction of the commissioners appointed by act of assembly for that purpose. And also, that the ground so declared for is included within the lines and bounds of lots No. 1 and 2, parts of lot No. 11, in *Baltimore Town*, as laid off and sold by the commissioners appointed for the purpose of preserving confiscated *British* property, to *John M'Clure*; and that *Edward Fotteral*, formerly of *Baltimore Town*, was in his life-time seized in fee of lot No. 11, and died seized thereof. That the ground so declared for is part of said lot No. 11, of which part said *Fotteral* died seized, prior to the survey and condemnation of the same for the court-house and prison above mentioned." The plaintiff also read in evidence, by consent of the defendant, an act of the general assembly, passed at May session 1768, *ch.* 14, entitled, "An act for erecting a court-house and public prison for *Baltimore* county, in the Town of *Baltimore*, and for making sale of the old court-house and prison." By which act *John Beale Bordley*, &c. "or the major part of them, are empowered to apportion and lay out not more than one acre and half an acre of the upper part of *Calvert-street*, next *Jones's Falls*, and to agree with the owners thereof for the purchase, or if the owners will not or cannot legally contract with them, the said commissioners may issue their warrant to the sheriff of the county for summoning a jury of not less than twelve freeholders, to appear before them at *Baltimore Town*, upon a certain day, to inquire to whom the land belongs, the value thereof, and what damage the owner or owners will sustain by being deprived thereof. The sum assessed by the said jury is to be paid by the commissioners; and the payment for the land shall invest the justices of *Baltimore* county, and their successors, with an estate in fee simple, for the use of the county for ever. The commissioners are to cause the land to be laid out with boundaries by the surveyor, and a certificate thereof to be entered on the county records, they are then to contract for building on the said land a court-house and a prison, with a prison yard and other conveniences." The plaintiff also produced a paper, purporting to be an *inquisition*, taken before four of the commissioners named in the said act of assembly, being the major part of the commissioners, and a plat and certificate made out and returned by order of the said four commissioners, which paper was lodged by the said four commissioners in the clerk's office of *Baltimore* county court, more than forty years ago, and was admitted by the parties to have been signed and sealed by the said four commissioners, and by the persons whose names it bears as jurors, viz. "An inquisition indented and taken at *Baltimore Town*, in *Baltimore* county, before *John Moale*, *Robert Alexander*, *William Smith* and *Andrew Buchanan*, commission-

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ers appointed by an act of assembly, entitled, An act for erecting a court house and public prison for *Baltimore* county, in the town of *Baltimore*, and for making sale of the old court house and prison, by the oaths of *John Smith*," &c. &c. "good and lawful men of the county aforesaid, jurymen duly summoned, sworn, and charged to say, upon their oaths, who is or are the owner or owners of the land laid off and included in the survey hereunto annexed, made by order of the said commissioners, agreeable to the said act, and what is the value of the said land, and what damages such owner or owners will sustain—Do upon their oaths say, that thirty square perches, part of the land included in the said survey, is part of a lot of land distinguished by the No. 11, in the plat of *Baltimore* town, and that the heirs of *Edward Fotterell* is owner thereof, and that the same is of the value of thirty-seven pounds fifteen shillings current money; and that one acre and one quarter of an acre and four perches and an half perch, other part of the land included in the said survey, is part of the lots No. 8," &c. "and that *A. L* is owner thereof, and that the same is of the value of £82, and that 72 and an half perches, the remainder of the said land, is part of *Calvert* street, in *Baltimore* town, and that the said land will not sustain any damage. In testimony whereof, as well the said commissioners, as the said jurors, have hereunto set their hands and seals this 10th day of February, 1769." Signed and sealed, &c. by the commissioners and jurors. "17th day of April 1770, Received of the commissioners, for building the court house and prison, the sum of thirty-seven pounds fifteen shillings current money, the sum mentioned in the within inquisition, as the value of the land therein specified to be the property of *Edward Fotterell's* heirs—received by virtue of a power of attorney from *Robert Taaff*, and *Achsah* his wife, the daughter and heir at law of the said *Edward Fotterell*.

John Flanagan."

The plat and certificate made by *James Everett*, deputy surveyor of *Baltimore* county, dated the 15th of December, 1768, also follow, containing one acre and seventy-four and a half square perches of land, 72½ square perches of which is part of *Calvert* street. The plaintiff also gave in evidence, that the persons whose names purport to be signed to the said paper as jurors to make the said inquisition, were inhabitants of the said county at the time when the inquisition purports to have been made, and then were among the most substantial freeholders thereof. He also gave in evidence, by *William Smith*, one of the said four commissioners, who was sworn as a witness in this cause, that the said four commissioners met under and by virtue of the said act of assembly, in order to execute the powers thereby vested in them, and did, as the said witness believed, proceed regularly in the execution thereof, according to the directions of the said act, but he had no particular recollection of the particular acts done by them further

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than his knowledge of his and their signatures, and of some of the jurors. The plaintiff also gave in evidence, that the writing endorsed on the said paper, purporting to be a receipt by *John Flanagan* from the commissioners for building the court house and prison, for £37 15 0 current money, was signed by *Flanagan*, who declared himself to be, and was always reputed and acted as the agent for *Robert Taaffee*, before and during some time after the year 1770, and that before and during the year 1770, *Robert Taaffee*, and *Achsah* his wife, which *Achsah* was the only surviving child and heir at law of *Edward Fotterell* then deceased, resided in the kingdom of *Ireland*. He also gave in evidence, that on the 2d of March, 1796, the clerk of *Baltimore* county court did, of his own accord, enter and record the said paper and endorsements, for safe keeping and preservation, among the land records of *Baltimore* county; said paper having until that time, and ever since, remained in his office and keeping, where the said paper was, during the whole of that time, occasionally, and from time to time referred to by parties, whose property was affected thereby, to ascertain the limits of the public grounds. He also gave in evidence, that the commissioners named in the said act of assembly did, in pursuance thereof, immediately, or soon after the date of the said paper, proceed to erect, and did erect, on a part of the ground mentioned and described in the said paper as having been condemned in pursuance of the said act, a court-house and gaol for *Baltimore* county, which were for a long time used and occupied as such, and which court-house still continues to be so occupied, a new court-house for the said county having been since began, but not yet finished, on that part of the said ground, which was at first occupied by the said gaol; but neither the said court-house nor gaol, or any part of them, were upon the premises in the declaration in this case mentioned. He also gave in evidence, that *Daniel Chamier* was sheriff of *Baltimore* county during the year 1769; that he left this state about the year 1775, and never returned, and has been dead many years; that his official papers, which were in his possession, are lost. That all the commissioners and jurors before named, except *William Smith*, are dead. The plaintiff then offered to read to the jury the said paper, and the receipt thereon endorsed, as evidence to prove that the premises in the declaration mentioned, being part of the ground mentioned and described in and by the said paper, were vested in the justices of *Baltimore* county for the time being, and their successors, in fee simple, for the use of the said county, pursuant to the provisions of the said act of assembly. The defendant then moved the court to direct the jury, that the said paper, so offered as aforesaid, is not competent evidence for the purpose for which it was offered. Of which opinion the Court [*Nicholson*, Ch. J.] was, and directed the jury accordingly. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Harper, for the Appellant. Although the inquisition may not be strictly according to the act of assembly under which it was taken, yet it is substantially correct, and length of time, payment of the money under it, and the acquiesence of the parties, cures all defects, if any existed.

W. Dorsey and *Winder*, for the Appellee. Where a power or authority is specially delegated, it must be strictly pursued, and it must appear on the face of the proceedings that it was so pursued. They referred to *Kerr et al. vs. The State use of the Levy Court, &c.* 3 *Harr. & Johns.* 560. *Ellicott et al. vs. The Levy Court, &c.* 1 *Harr. & Johns.* 359. *Quynn vs. The State use Pue et al. Ibid* 36. By the act, under which the inquisition now under consideration was taken, a special authority was delegated— 1. The commissioners were to lay out one acre and an half, instead of which they laid out 307 square perches, or one acre and an half and 67 square perches. 2. It does not appear that any attempt to agree with the parties, who owned the land, was made by the commissioners. 3. Nor that any warrant issued to summon the jury. 4. The inquisition does not show that the jurors were *freeholders*. 5. The jury were directed by the act to find who were the owners of the land, and what damages would be sustained. They find the owner and value as to part, but say nothing as to the residue. They find, that the *heirs* of *E. Fotterell* were the owners, when they should have said who those heirs were. 6. The commissioners paid *Flanagan* when there was no evidence that he was the agent of *Fotterell's* heirs. 7. The commissioners were required to have the land surveyed and boundaries fixed. This was not done, nor does it appear that the land condemned was ever surveyed, or if surveyed, that it was the land which was condemned. If the survey which was made is legal, yet there are no boundaries stated in the certificate. There are blanks left, supposed to be intended to be filled up with a description of the boundaries. 8. The surveyor of *Baltimore* county was to make the survey, yet it was done by a deputy surveyor, who refers to an act different from the one which passed. 9. The proceedings were not recorded at the instance of the commissioners. They were lodged in the office, but by whom is not known. If all or any of these objections are held to be sufficient, the paper could not be read in evidence. They referred to *Rex vs. Sparling*, 1 *Stra.* 497. *Rex vs. Jarvis*, 1 *Burr.* 153; and *Rex vs. Croke*, 1 *Cowp.* 26, 27, 28, 29.

Harper, in reply. 1. The lines of the survey include more than an acre and an half, but 72 perches are part of *Calvert* street, and the act meant that the street should be excluded. 2. This objection cannot be taken advantage of

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by strangers. The immediate parties acquiesced at the time; they agreed to the proceedings, and received the valuation. It may be presumed, after a lapse of 40 years, that the parties were consulted. The daughter of *Fotterell* was a *feme covert*, living in *Ireland*, and she could not be consulted. 3. There must have been a warrant, as its effect was produced by the appearance of the jury, who would not have appeared without being summoned. 4. The evidence given at the trial was, that the jurors were freeholders, and the defect of the inquisition is supplied by the evidence. It would be presumed that they were freeholders if there was no evidence that they were. 5. It was not certain at the time who were the heirs of *Fotterell*; and being named as heirs is quite sufficient. 6. If the proper person was not paid, the person entitled would have applied, and as no person has applied, the presumption is that *Flanagan* had authority to receive the money. 7. It is to be presumed that boundaries were fixed, and that the commissioners did their duty, and that they placed boundaries, which have since been removed, by cutting away the ground on which the court house stood, which was upwards of 20 feet above where the street was cut as it now runs. The act does not say the surveyor was to fix boundaries, so that the blanks left in his certificate have nothing to do with the fixing of the boundaries by the commissioners. 8. The act of a sworn deputy is the act of his principal. He described the substance of the law, and did not refer to it by the title. 9. The proceedings were put into the proper office, and it must be presumed that they were placed there by the commissioners for the purpose of being recorded. Why placed there unless for that purpose? The clerk's omitting to record them is not to invalidate the copy produced. The proceedings being recorded by the present clerk shows that he considered it to have been the duty of his predecessor. There can be no doubt that special authorities in recent transactions must appear to have been strictly pursued. But from length of time, acquiescence, &c. a strict compliance will be presumed, and all defects cured. The defendant does not claim under any of the original owners or holders, and has therefore no right to call for a strict compliance with an authority of so long standing. This proceeding is to be considered as a conveyance, and the lessors of the plaintiff entitled to all that aid which every other conveyance is entitled to from presumption by length of time.

JUDGMENT AFFIRMED.

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Appeal from *Baltimore* County Court. This was an action of *assumpsit*. The declaration contained six counts. The first and second for goods, &c. sold and delivered, and a *quantum meruit*, &c. The third, fourth and fifth, the common money counts, and the sixth on an *insimul computassent*. The general issue was pleaded.

D and W had an account rendered to them as the owners of a vessel, by M and N. The vessel and her cargo, mentioned in the account belonged to D and W, who were partners in that transaction only. D was the agent in purchasing the vessel and cargo, and in the transactions relating to the original voyage, and as such consigned the vessel and cargo to M and W at *St. Thomas's*, from whence she was to have been sent to W at *Jacquemel*, to be under his direc-

1. The plaintiffs, (the appellants,) at the trial, read in evidence the following account in the defendant's hand writing, rendered to them as owners of the schooner *Holstein*, by the defendant, (the appellee,) and a certain *Patrick Wood*, trading under the firm of *Duncan M'Intosh* and *Wood*, viz. "Dr. The Owners of Schooner *Holstein*, their account current with *Duncan M'Intosh* and *Wood*

To amount of disbursements of schooner *Holstein*, as per account rendered by Mr. *John Imlay*, dated 25th of August 1800, $1,443

tions. The vessel was prevented from arriving at *Jacquemel*, and got into *Aux Cayes*, when E, acting for W, loaded her with a cargo of coffee and sent her to *St Thomas's* consigned to N, which cargo is that mentioned in the account; and it was known to M and N that both vessel and cargo belonged jointly and equally to D and W Evidence was offered by M in an action brought against him by D and W, that before the account was rendered, D was indebted to M and N in $5000, as stated in the account, and in consideration thereof did verbally direct M and N to retain in their hands, out of the proceeds of the vessel and cargo, in discharge of the said debt, the sum of $5000 as charged in the account as retained by them; and to show that when the direction was given to M and N by D, W was indebted to D in a sum larger than the interest of W in the $5000, M offered in evidence certain accounts between D and W signed by D—*Baltimore* county court refused to permit the evidence or accounts offered by M to go to the jury.

M gave in evidence by E, that he E, by authority from W, on behalf of himself and D, purchased at *Aux Cayes* the cargo of coffee mentioned in the first above mentioned account, and shipped it for their account and risk, the cost and charges of which shipment and cargo, he charged to them in an account which he transmitted to W in 1800 soon after the shipment was made; and the first mentioned account was rendered to E by M in 1802, a copy of which he sent to W soon afterwards. That W, both before and after the rendition of the account to E, always alleged against the account which E rendered against D and W, that the voyage from *Aux Cayes* to *St. Thomas's* was and ought to be considered as on account of E; but E insisted on his right to recover from D and W, and brought suit against them, and recovered judgment. That M had not been in this state since 1800, until just before the time he was sued in this action. Before the account was rendered by M, W inquired of E if he had ever brought M to a settlement as to the business of the vessel—*Baltimore* county court refused to direct the jury that from this evidence they might find that W assented to the application made by M of the $5000 to the payment of the debt due to M from D.

M then gave in evidence, that after the account of E against D and W, charging them with the costs of the cargo shipped to *St. Thomas's* was rendered by him to W, W did, on the part of the owners, object to the said charge, and refused to consider or accept the cargo as the property of D and W, and insisted that it was the property of E, and refused to pay E for it, and continued so to refuse until after a recovery against D and W by E That D authorised and permitted M to apply the $5000 to the payment of the debt due from D to M but this direction was without the authority of W. *Baltimore* county court refused to direct the jury, that if they believed all the facts as given in evidence by both parties, that then the conduct and refusal of W operated in law to preclude D and W from recovering.

A vessel with a cargo of flour on board belonging to D and W, citizens of the *U S.* sailed from *Baltimore* to *St. Thomas* in the *West Indies* in the month of October 1799, with a view and for the purpose of there assuming *Danish* colours, and a *Danish* character, and under them of proceeding on a trading voyage for the benefit and account of D and W She arrived there in November 1799, and was there put under *Danish* colours as the property of J V, a *Danish* subject, and dispatched to *Jacmel* by directions of D and W, she still continuing to be their property. In November 1799, she sailed from *St. Thomas's* and arrived at *Aux Cayes* in the island of *Hispaniola*, about the 1st of December following. The cargo was then sold by E H, the agent of D and W, and a new cargo purchased with the proceeds thereof, which new cargo E H in the same month of December sent from *Aux Cayes* in the same vessel to *Curracoa* for account of D and W, from whence the vessel returned to *Aux Cayes* about the 1st of April 1800 E H, still acting for D and W, then purchased a new cargo of coffee at *Aux Cayes* for D and W, and put it on board the same vessel, and about the 20th of April 1800, dispatched the vessel and cargo from *Aux Cayes* back to *St Thomas's*, consigned to N of the house of M and N, as his own property apparently, but in fact for D and W. The vessel and cargo arrived at *St. Thomas's* in May 1800, and were sold in August 1800, and the proceeds of sale paid to M as the partner of N for and on account of D and W. For the proceeds so paid to M an action of *assumpsit* was brought against him by D and W—*Held*, that the voyages from *Baltimore* to *St. Thomas's*, from *St Thomas* to *Aux Cayes*, and from *Aux Cayes* back to *St. Thomas's* were illegal, being contrary to the acts of congress interdicting commerce with any port or place within the territory of the *French* republic, or the dependencies thereof, or with any place in the *West Indies*, or elsewhere under the acknowledged government of *France*; and that D and W could not recover

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To amount of premium of insurance paid on schooner *Holstein* by Mr. *John Imlay*, as per his account furnished	780	
To this sum due by Messrs. *David Stewart* and Sons, as per their account furnished Mr. *Edward Hall*, and which we stop out of *Holstein's* cargo,	5,195	46
To this sum paid in *St. Thomas's* on two bills of exchange drawn by us on *David Stewart* and Sons, and which they suffered to return protested	460	
To this sum accounted with *Mr. Edward Hall* for the balance of this account,	8,677	13
	$16,555	59
Cr.		
By nett proceeds of sales of the cargo of coffee from *Aux Cayes*, as per sales rendered pr. Mr. *John Imlay*, dated 25th of August 1800	15,355	59
By amount of schooner *Holstein* sold for,	1,200	
	$16,555	59

Errors and omissions excepted.

Aux Cayes, 9th May 1802."

The plaintiffs also gave in evidence, that the said schooner *Holstein*, and the cargo, in the said account mentioned, belonged jointly and in equal portions to the house of *David Stewart* and *Sons*, and to the house of *Hillen & Williams*, which two houses (and who are the plaintiffs in this cause,) had jointly purchased said vessel and cargo, and were partners in that transaction, but in no other. That in the original purchase of said vessel, and her outward cargo, on her original voyage from *Baltimore* to the Island of *Saint Thomas's*, and in the transaction and management of the business relating to the original voyage, *David Stewart* and Sons were the agents of the owners, and as such consigned the vessel and outward cargo to the defendant and *Wood*, at the Island of *St. Thomas*, in the *West Indies*, from whence she was to have been sent to *Williams*, one of the plaintiffs, at *Jacquemel*, in the Island of *Hispaniola*, there to be under his direction and management. That the schooner was so dispatched by the defendant and *Wood*, but was prevented from arriving at *Jacquemel*, and got into the port of *Aux Cayes*, in the same Island, where a certain *Edward Hall*, acting by the authority of *Williams*, loaded her with a cargo of coffee, and sent her to *St. Thomas*, consigned to *Wood*, which cargo is the one mentioned in the account current herein before set forth; and that at the time of receiving the vessel and cargo, and the proceeds thereof, as stated in the above mentioned account, it was known to the defendant and *Wood* that both vessel and cargo belonged jointly and equally, to the plaintiffs. The de-

fendant then offered evidence to prove, that before the said account was made out and rendered as aforesaid, *David Stewart* and Sons were indebted to the defendant and *Wood*, in the amount of $5655 46 as stated in said account, and in consideration thereof did expressly authorise and direct verbally the defendant and *Wood* to retain in their hands, out of the proceeds of the vessel and cargo, and in discharge of the said debt, the several sums charged by them in the said account, as having been by them so retained, and amounting together to the said sum of $5655 46. And further, to show that at the time when the said authority and direction were given to the defendant and *Wood*, by *David Stewart* & Sons, *Hillen & Williams* were indebted to *David Stewart* & Sons in a sum larger than the interest and proportion of *Hillen* & *Williams* in the said sum of $5655 46, and therefore that *David Stewart* & Sons had a just right to give the said authority and direction, the defendant produced and offered in evidence certain accounts between *David Stewart* & Sons, and *Hillen & Williams*, stated and signed by *David Stewart*, one of the plaintiffs. But the plaintiffs objected to the evidence so offered by the defendant, and to the said accounts, as competent to prevent the recovery of the plaintiffs. This objection the Court [*Nicholson*, Ch. J. and *Bland*, A. J.] sustained, and refused to permit the evidence or accounts to go to the jury. The defendant excepted.

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2. The defendant then produced *Edward Hall* as a witness, who gave evidence that he, by authority from the plaintiff *Williams*, acting on behalf of all the plaintiffs, purchased at *Aux Cayes* the cargo of coffee shipped by the schooner *Holstein* to *St. Thomas*, and mentioned in the account first stated in the *first* bill of exceptions, and shipped it as aforesaid for their account and risk, the cost and charges of which shipment and cargo he charged to them in his account against them; which account he transmitted to the plaintiff, *Williams*, some time in the spring of 1800, very soon after the shipment was made; and that the account first exhibited in the *first* bill of exceptions, was rendered to him, the witness, by the defendant, about the time it bears date, a copy of which account he enclosed to *Hillen & Williams*, or *Williams*, some short time after he received the same from the defendant. That *Williams*, both before and after the rendition of said account to the witness, always alleged against the account rendered against the schooner and her owners, that the voyage from *Aux Cayes* to *St. Thomas*, ought not to be charged to the owners of the schooner, but was and ought to be considered as on account of the witness. But the witness insisted on his right to recover the same from said owners, and brought a suit against the plaintiffs, and did recover a verdict and judgment against them for the whole amount of said claim, in *Baltimore* county court, at March term 1808. That the defendant has never been in *Baltimore* since the beginning of the year 1800, till just

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about the time of the institution of this suit. That some time before the said account was rendered by the defendant, *Williams* inquired of the witness if he had ever brought the defendant to a settlement about the *Holstein's* business. The defendant then prayed the court to direct the jury, that from this evidence they might find that the plaintiff, *Williams*, assented to the application made by the defendant of the said sum of $5655 46, to the payment of the debt due to the defendant from *Stewart* and Sons. Which direction the court refused to give. The defendant excepted.

3. The defendant then gave in evidence, that after the account of *Hall* against the plaintiffs, charging them with the cost of the cargo shipped by him to *St. Thomas's*, was rendered by him to the plaintiff *Williams*, the said plaintiff did, on the part of the owners, object to the said charge, and refused to consider or accept the said cargo as the property of the plaintiffs, but insisted that it was the property of *Hall*, and did refuse to pay for it to *Hall*, and continued so to act and refuse until after the recovery against him, and the other plaintiffs, by *Hall*. He also gave in evidence, that *David Stewart* and Sons authorised and permitted the defendant to apply the said sum of $5655 46 to the payment of the debt due as aforesaid from them to him, but this direction was without the authority of *Hillen* & *Williams*. The defendant then prayed the opinion of the court to the jury, that if they believed the facts so given in evidence by the defendant and plaintiffs, as stated in this exception, that then the said conduct and refusal by the plaintiff, *Williams*, operates in law to preclude the plaintiffs from recovering in this action. This opinion the court also refused to give. The defendant excepted.

4. The defendant then gave in evidence, that the plaintiffs, in repeated conversations and correspondences, admitted that the schooner *Holstein* had been sent from *Baltimore* by *David Stewart* & Sons, by authority from *Hillen & Williams*, and for account of the plaintiffs, and belonging to them, under the name of *The Speculation*, to the Island of *St. Thomas's*, with a view and for the purpose of there assuming *Danish* colours and a *Danish* character, and under them of proceeding to the port of *Jacmel*, in the Island of *Hispaniola*, on a trading voyage, for the benefit and account of the plaintiffs. That the schooner, with a cargo of flour on board belonging also to the plaintiffs, accordingly sailed from *Baltimore*, for the purpose aforesaid, in the month of October, 1799, to *St. Thomas's*, and arrived there in the month of November in the same year. That both vessel and cargo were consigned by *David Stewart &* Sons to the defendant and *Wood*, by whom they were there put under *Danish* colours as the property of *Jeremiah Vernico*, a *Danish* subject, and despatch-

ed to *Jacmel*, in pursuance of the orders of the owners, and still continuing to be their property according to the original intention and plan. That the vessel and cargo accordingly sailed from *St. Thomas's* in the month of November 1799, and arrived at *Aux Cayes* in the island of *Hispaniola*, on or about the 1st of December following, and were there placed under the direction of the said *Edward Hall* by the plaintiff, *Williams*. That the cargo was immediately sold at *Aux Cayes* by *Hall*, for account of the said owners, and a new cargo purchased with the proceeds thereof, which new cargo *Hall*, in the same month of December, sent from *Aux Cayes* in the schooner to the island of *Curracoa*, for account of the said owners, from whence the schooner returned to *Aux Cayes* on or about the 1st of April 1800. That *Hall*, still acting for the owners under the authority of the plaintiff *Williams*, did then purchase a new cargo of coffee at *Aux Cayes*, for and on account of the said owners, and put it on board of the schooner; and on or about the 20th day of the same month, dispatched the schooner and cargo from *Aux Cayes* back to *St. Thomas's*, consigned to *Patrick Wood*, of the house of *M'Intosh* and *Wood*, as his own property apparently, but in fact for the plaintiffs, or in case of his absence, to a certain *John Imlay*, then the attorney in fact and agent of the said *Wood*, to be disposed of for and on account of the plaintiffs. That the said vessel, and the last mentioned cargo, arrived in *St. Thomas's* in the month of May 1800, and, *Wood* being then absent, were taken into possession and sold by *Imlay* as his attorney in fact, who in the month of August in the same year paid to the defendant the nett proceeds of the said sales as a partner of said *Wood*, for and on account of the plaintiffs, as stated in the account first herein before mentioned. He also gave in evidence, that at the time when the said schooner *Speculation* was dispatched from *Baltimore* to the island of *Saint Thomas's*, with the views and objects aforesaid, and during the several voyages of the said schooner as aforesaid, the plaintiffs were citizens of the *United States*, and residents therein. The defendant then prayed the direction of the court to the jury, that if they believed the said facts, then the voyage from *Baltimore* to *St. Thomas's*, from *St. Thomas's* to *Aux Cayes*, and from *Aux Cayes* back to *St. Thomas's*, were illegal, and that the plaintiffs could not therefore recover in this action. This direction the court gave. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued on the last bill of exceptions, before BUCHANAN, EARLE, JOHNSON and MARTIN, J.

Martin, *Winder* and *Mercer*, for the Appellants. The defence set up by the defendant in the court below was, that the voyages were illegal, and that although the amount in dispute was received by him as the agent of the plain-

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tiffs, yet that he had a right to retain it, because the plaintiffs could not recover the proceeds of an illegal transaction. They contended—1. That the voyage, under which the proceeds arose, was not an illegal one under the acts of congress then in force. 2. That the money was received by the defendant at the island of *St. Thomas*, and that as he could not have objected there to the paying it over, he could not object here. 3. That the money was not received by the defendant in execution of the contract, as with that he had nothing to do, he being no party to it.

On the *first* point. The act of congress of the 13th of June 1798, *ch.* 70, interdicted commerce with "any port or place within the territory of the *French* republic, or the dependencies thereof, or with any place in the *West Indies*, or elsewhere, under the acknowledged government of *France*." This act was to continue in force until the end of the next session of congress, which terminated on the 3d of March 1799. By the act of the 9th of February 1799, *ch.* 108, there was a similar interdiction after the 3d of March 1799. This act was to continue in force until the 3d of March 1800, when it expired. By the act of the 27th of February 1800, *ch.* 164, (10,) "all commercial intercourse between any person or persons resident within the *United States*, or under their protection, and any person or persons resident within the territories of the *French* republic, or any of the dependencies thereof, shall be, and from and after the second day of March next is hereby prohibited and further suspended," &c. The *seventh* section declares, "that the whole of the island of *Hispaniola* shall, for the purposes of this act, be considered as a dependency of the *French* republic." This act was to continue in force until the 3d of March 1801, "provided, however, the expiration thereof shall not prevent or defeat any seizure, or prosecution for a forfeiture, incurred under this act, and during the continuance thereof." The question arises under the act of 1799, which interdicted the trading to a place acknowledging the government of *France*. The island of *Hispaniola*, did not acknowledge itself to be under the government of *France*, and there is no proof that it was. It is not therefore embraced by the act of 1799. *De facto* the island was independent, of course the people denied the jurisdiction of *France*. The island having been named and included by the act of 1800 for the purposes of that act, shows that it was not embraced by the act of 1799. If any one of the voyages was legal, the judgment must be reversed.

On the *second* point. The money was received by the defendant at *St. Thomas*, and came within the laws of that island, and if he was bound to pay the money to the plaintiffs there, he is bound to pay it to them here. If he had been sued there, he could not have defended himself upon the ground that the money received was the proceeds of an illegal traffic interdicted by the *U. S.* The law of the place where the obligation or cause of action arises, is

the law that is to govern. *Desobry vs. De Laistre*, 2 *Harr. & Johns.* 191. *Owings & Cheston vs. Nicholson & Williams, (ante* 66.) *Alves vs. Hodgson*, 7 *T. R.* 241. *Phelps vs. Kent*, 4 *Day's Rep.* 96.

On the *third* point. If the voyage was illegal, yet the defendant cannot take advantage of it. He received the money as an agent, and he is bound to pay it over. He was not a citizen of the *U. S.* and could not be affected by the transaction, if it was illegal. They cited *Cotton vs. Thurland*, 5 *T. R.* 405. *Jaques vs. Golightly*, 2 *W Blk. Rep.* 1073. 2 *Com. on Cont.* 112, 123. *Tenant vs. Elliott*, 1 *Bos. & Pull.* 3. *Farmer vs. Russell*, *Ibid* 296. *Faikney vs. Reynous*, 4 *Burr.* 2069. *Petrie vs. Hannay*, 3 *T. R* 418. *Whittingham vs. Thornborough*, *Prec. in Chan.* 20. *Barjeau vs. Walmsey*, 2 *Stra* 1249. *Lacausade vs. White*, 7 *T. R.* 531. *Wilkinson vs Kitchin*, 1 *Ld. Raym.* 89; and *Alcinbrook vs. Hall*, 2 *Wils.* 309.

Harper, for the Appellee. The legal principles relied upon for the appellants will not be contested; their application to this case however is denied. The laws might always be violated by the intervention of an agent, if the doctrine contended for on the other side was to prevail. The act of Congress of 1799, was further to suspend, &c. and it interdicted the trade 1. With old *France*. 2. Her colonies; and 3. Places conquered or occupied by her, &c. 1. Any port or place within the territory of the *French* republic. 2. Or, of the dependencies thereof. 3. Or, any place in the *West Indies*. The territory of *France* might include dependencies and places conquered by the *French* arms, and remaining under the government of *France*. 1. The only question is, whether *St. Domingo* in 1799 came within either of the above descriptions? Was *St. Domingo* then a dependency of France? This cannot be denied. Our courts are bound to take notice of the political state of foreign countries. To do so they must resort, where the fact is doubtful, to what our government consider to be the particular situation of any country. As to the people of *St. Domingo* attempting to become independent, it is not to be noticed by our government or our courts, as that island has never been acknowledged to be independent by *France*. If our government were to acknowledge the independence of *St. Domingo*, it would be involving the country in a dispute with *France*. The public acts of governments are to be taken notice of by courts. If there is a treaty between *Great Britain* and *France*, and one of them cedes to the other an island, &c. then our courts are bound to notice such treaty, because our government takes notice of it. But where there is a contest between the mother country and its colony, our government stands neuter, and considers the colony as under the government of the mother country. 2. There is a great distinction between the appellee and the agents and stake-holders in the several cases cited by the counsel for the appellants. Here

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the appellee was the agent of the parties, and was apprized of the illegal voyage, and he was privy to the illegal transaction, aiding and assisting in it; and as such agent, and with such knowledge, the money now demanded of him came into his hands. He cited 2 *Com. on Cont.* 109; and *Steers vs. Lashley*, 6 *T. R.* 61.

THE COURT concurred with the court below in the opinion stated in the last bill of exceptions.

BUCHANAN, J. dissented.

JUDGMENT AFFIRMED.

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KENNER & HENDERSON vs. KENNEDY & COX.

K and H of *New Orleans*, having purchased a quantity of cotton for K and C, drew bills on them for the amount, which being protested for non payment K and H were obliged to pay the amounts thereof, with 10 p c damages, according to the usage and custom prevailing in *New Orleans*. They afterwards brought their action against K and C for the amount paid by them for the cotton, the suit was referred, and the arbitrators not taking into consideration the 10 p c damages, awarded the amount to be paid by K and C, to K and H, for which a judgment was rendered, which was afterwards satisfied. K and H afterwards brought an action against K and C, to recover the 10 p c damages—*Held*, that they were not entitled to recover

APPEAL from *Baltimore* County Court. *Assumpsit* on sundry bills of exchange drawn by the plaintiffs, (now appellants,) on the defendants, (the appellees,) and by them accepted, &c. The general issue was pleaded.

At the trial the plaintiffs proved, that the defendants, and a certain *John Sherlock*, all of whom resided in the city of *Baltimore*, in the year 1806, authorised and empowered the plaintiffs, who resided in the city of *New Orleans*, to purchase, on their account, a quantity of cotton, amounting to the sum of ———, and to ship the same to *Lees & Sherlock*, of *Liverpool*. That the plaintiffs made the purchase, and drew bills on the defendants to reimburse them for part of the money expended by the plaintiffs in making the purchase; which bills were accepted by the defendants, and afterwards duly protested for nonpayment; which bills they offered in evidence. Of which protests due notice was given to the plaintiffs. The plaintiffs further offered evidence, that after the bills were protested, for nonpayment they, as the drawers of the bills, paid the amount thereof, with ten *per cent* damages, to the respective holders; and they further offered evidence, that according to the usage and customs of merchants prevailing at the city of *New Orleans*, the holder of a protested bill of exchange drawn at *New Orleans*, on a person in any one of the *United States*, is entitled to receive from the drawer of the bill ten *per cent.* damages on the amount of the bill. And the plaintiffs stated to the court and jury, that the present suit was instituted solely to recover ten *per cent.* damages on the said bills of exchange, with interest and costs thereon, amounting together to $1,227 92. The defendants then proved, that the plaintiffs to October term 1808 instituted a suit in *Baltimore* county court against these defendants, and the said *Sherlock*, to recover the amount by the plaintiffs expended in making the said purchase of cottons, with interest thereon. That the defendants and *Sherlock* appeared to that suit, and after-

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wards, at April term 1811, it was referred, by the consent of the parties, and by order of the court, to *Robert Oliver* and *William Cole*, who acted as arbitrators, and who awarded that there was due to the plaintiffs the sum of $5.643 51, on which award a judgment was rendered, which has been since satisfied and paid. And the defendants further proved, that the arbitrators awarded to the plaintiffs the full amount of the money then due and expended by them, with interest, in making the purchase of the cotton And that the arbitrators, in forming their award, did not take into consideration the damages on the said protested bills. The defendants then moved the court to direct the jury, that if they believed these facts, the plaintiffs were not entitled to recover; and the Court, [*Nicholson*, Ch. J. and *Bland* A J.] gave the direction. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J. by

Harper, for the Appellants, and by
W. Dorsey, for the Appellees.

JUDGMENT AFFIRMED.

MILLER vs. HONEY.

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On a plea of *non est factum*, the subscribing witness to the bill obligatory proved his own attestation, but had no recollection of having seen the defendant sign, seal and deliver the bill; that from seeing his hand-writing as a witness to the bill, and from his having lived with the plaintiff as a clerk at the time of its execution, and from being in the habit of attesting such instruments for the plaintiff, he believed the defendant had signed, sealed and delivered it—*Held*, that the testimony was competent and sufficient to prove the due execution of the bill

APPEAL from *Kent* County Court. Debt upon a bill obligatory for $337 80. The defendant, (now appellant,) pleaded *non est factum* specially—that he could not read writing, and that the consideration for which the bill was given, was stated to him to be $200, &c. Issue joined.

1. At the trial the plaintiff called the subscribing witness to the bill, who proved that the attestation was in his hand writing, but that he had no recollection of having seen the defendant sign, seal and deliver the bill. That from seeing his hand-writing, and from his having lived with the plaintiff, at the time of the execution of the bill, as a clerk, and from being in the habit of attesting such instruments for the plaintiff, he believed the defendant had signed, sealed and delivered the bill. To this testimony the defendant objected; but the Court, [*Earle*, Ch. J. and *Purnell* and *Worrell*, A. J.] determined that it was competent and proper, and permitted it to be offered to the jury. The defendant excepted.

2. The defendant then prayed the court to direct the jury, that the evidence offered was not sufficient to prove the due execution of the bill. The court refused to give the direction. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY. J.

Chambers, for the Appellant, cited *Abbot vs. Plumbe*, 1 *Doug.* 216. *Call vs. Dunning*, 4 *East.* 53. *Barnes vs. Trompowsky*, 7 *T R.* 266, (*note* c.) *Cooke vs. Woodrow*, 5 *Cranch*, 13. *Peake's Evid.* 96, 97, 98. *Grellier vs. Neale. Peake's N. P.* 146; and *Lowe vs. Jolliffe*, 1 *W. Blk. Rep.* 365.

J. E. Barroll, for the Appellee.

JUDGMENT AFFIRMED.

JUNE (E. S.)

SELBY'S Lessee vs. WILLISS.

J S, by his will in 1790, devised certain lands to his two sons J and D, and his three daughters N, P and B, in trust for his son W, and he authorised the trustees to sell all or any part of the lands in order to buy other lands, with the money arising from such sale, for the benefit of his son W, as should appear to a majority of his trustees to be most for his W's benefit; and if his son W should die without lawful issue, he then gave the lands to his above mentioned five children. In 1793 W, J, D and N, sold the lands to J W in fee simple, and on the purchase money being paid, they conveyed the lands to him. When this deed was executed, J, D, W. N, P, and B, were all alive and of full age, and N was at that time a *feme covert*, and afterwards died leaving four children. W died intestate, and without issue, before the death of N. On an ejectment brought by the heir of one of the trustees against J W, for one undivided twentieth part of the lands—*Held*, that he was not entitled to recover.

APPEAL from *Worcester* County Court. Ejectment for one undivided twentieth part of the tracts of land, called *Chance*, *John's Purchase*, *Wild Cat*, and *Addition to Wild Cat*. Defence was taken on warrant, and the general issue pleaded. The facts as agreed upon were these: A certain *John Selby* died seized of the lands in question, having by his will, dated the 13th of November 1790, devised as follows: "*Item*, I give and bequeath unto my two sons *James* and *Daniel*, and to my three daughters *Nancy*, *Polly* and *Betty*, the land I bought of *John Sturgis*, and all my land which lies on the north side of *Caulker's* Creek; also one negro woman called *Hannah*, and her two children, in trust for my son *William*, and his heirs; and I do direct, and do hereby authorise and empower my said trustees, and their heirs, to rent out the aforesaid lands, and hire out the aforesaid slaves, for the use and benefit of my said son *William*, or his heirs, or to sell all or any part of the said lands in order to buy more lands, with the money arising from such sale, for his benefit, as shall appear to a majority of my said trustees to be most to his benefit. I also empower my said trustees, or a majority of them, to settle my said son *William*, on any part of the aforesaid lands, if they in their discretion may think it advisable. And if my said son *William* shall have children by any marriage, I then empower my trustees, or a major part of them, to convey the aforesaid lands and negroes to such of my said son *William's* children as they, or a majority of them, may think proper; but if my said son *William* shall die without lawful issue, I then give the lands and negroes aforesaid devised in trust as aforesaid, to my five children *James*, *Daniel*, *Nancy*, *Polly* and *Betty*, to be equally divided between them and their heirs for ever." On the 31st of December 1793, *William*, *James*, *Daniel* and *Nancy*, sold the lands mentioned in this will, to a certain *Jabez Williss*, in fee simple, for the sum of £150 15 0, which sum being paid by *Williss* to

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the bargainors, they afterwards, on the same day, executed a deed, conveying to him the lands in question. At the time of the execution of this deed, *James*, *Daniel*, *William*, *Nancy*, *Polly* and *Betty*, mentioned in the will, were all alive and of full age, and *Nancy* was at that time a *feme covert*, married to one *Gunby*, and afterwards died leaving the following children and heirs at law, to wit. *George*, *Betty*, *John* and *Ann*. *William*, named in the will, died intestate and without issue, before the institution of this suit, and before the death of *Nancy*. The defendant claims title under *Jabez Williss*, by devise. The present suit was brought by one of the heirs of the said trustees. Upon these facts the county court gave judgment for the defendant, and the plaintiff appealed to this court, where the cause was argued before CHASE, Ch. J. and JOHNSON, and DORSEY, J. by

Bullitt, for the Appellant, and by
J. Bayly, for the Appellee.

JUDGMENT AFFIRMED.

WALLS vs. HEMSLEY, *et al.*

JUNE, (E. S.)

APPEAL from *Queen Anne's* County Court. This was a petition for freedom, preferred by the appellees against the appellant. The general issue was pleaded.

The reputation of the neighbourhood, that the mother of a petitioner for freedom was a free woman, is not admissible in evidence.

The declarations of a person since dead, but then holding the mother of a petitioner for freedom in slavery that she was a slave, are not admissible in evidence

1. At the trial the petitioners proved by *G. Griffin*, that some time before the surrender of *York Town* to the *American* army, the witness had gone to *James* River, with one captain *J. Sweat*; that he was afterwards transferred to the *Baltimore* Galley, and after the surrender of the *British* he again went on board captain *Sweat's* vessel and went into *York* River. That about two or three weeks after the said surrender, he left *York Town*; that before he left there he had been on shore at *Gosport*, where he had seen negro *Suck*, the mother of *Henny*, one of the petitioners, selling cakes and beer without control; and that he saw her repeatedly afterwards selling cakes and beer at the shore of the river at *York Town*, until the day before captain *Sweat* sailed, when *Suck* was brought on board his vessel by five or six men at about 9 o'clock at night, and purchased by *Sweat*. That another black woman was brought on board captain *Sweat's* vessel by the same persons, who was released and set on shore in consequence of her cries and screams. That *Sweat* had informed *Suck* that he would make her his wife. That *Suck* had said, during her passage to *Maryland*, that she was sorry she had come away, as she was free in *Virginia*, and had a white husband there. On cross examination, the witness was asked if he had heard the story of kidnapping mentioned

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at any period since he came to *Maryland*, or whether at any time since he had mentioned it? To which he answered, he did not recollect to have mentioned it, but had heard it talked of. The witness also proved, that one *B. Sweat* returned to *Maryland* with captain *Sweat* and himself, and that both captain *Sweat* and *B. Sweat* are dead. The petitioners then proved by *J. Denny*, that he had heretofore resided in the immediate neighbourhood of *W. Sweat*, (who is now dead,) the brother of captain *Sweat*, and with whom negro *Suck* then lived; that he heard a conversation between *Suck* and the mother of the witness, in which *Suck* stated herself to have been free in *Virginia*, and to have been stolen from thence by captain *Sweat*. The witness was then asked by the counsel for the petitioners, if it was the reputation of the neighbourhood that *Suck* was a free woman? To this question the defendant, by his counsel, objected. But the Court, [*Earle*, Ch. J. and *Worrell*, A. J.] overruled the objection, and permitted the witness to answer the question, and to testify as to the reputation of the neighbourhood in relation to *Suck's* freedom. The defendant excepted.

2. The petitioners then proved by the above mentioned witnesses, the declarations of captain *Sweat* as to the freedom of *Suck*. The defendant then proved, that captain *Sweat* had sold *Suck* to *J. Gibson*, deceased; and then proposed to prove, by the declarations of *Gibson*, that *Suck* was a slave. But the petitioners, by their counsel, objected to the testimony; and the court would not permit it to be given. The defendant excepted; and the verdict and judgment being against him, he appealed to this court, where the cause was argued before CHASE, Ch. J. and BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Chambers and *Harrison*, for the Appellant, cited 1 *Phill. Evid.* 174, 177, 178 *Peake's Evid.* 12; and *The King vs. The Inhabitants of Erith*, 8 *East*, 539.

Carmichael, for the Appellee, cited *Peake's Evid.* 10, 14,

THE COURT dissented from the opinion of the county court in the *first* bill of exceptions, but concurred in that in the *second*.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

HALL *vs.* JACOBS, *et al.* Lessee.

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ERROR to *Anne-Arundel* County Court. Ejectment on a joint demise to recover the following tracts of land, viz. *The Garden Recovered*, *Denchworth* and *Westal's Resurvey*.

R J died in 1783, having devised certain lands to be equally divided between his three children J, D and R, and their respective heirs. In 1800 J and R died intestate, and without issue. D died in 1803, intestate, and without issue, leaving no brother or sister of the whole blood, but leaving J J his uncle, (brother of the whole blood of R J,) and E and F his aunts; (sisters of the whole blood of R J)—P, the widow of R J, and mother of J, D and R, intermarried with J H, by whom she had issue J H—*Held*, that the interest in the one third of the land which was vested in D, by the will of his father R J, was an estate by *purchase*, and as such embraced by the act of 1786, *ch.* 45, and on his death descended to his brothers and sisters of the half blood; that his interest in the two thirds, which were devised by the same will to J and R, and which, at their deaths descended to him, was not an estate embraced by any of the provisions of the said act, and descended at the death of D, to J J the brother of R J, to the exclusion of E and F.

An estate by *purchase* at common law, and within the meaning of the said act of assembly, is an estate acquired by sale or gift, or by any other method, except only that of descent.

The words in the said act, "and not derived from or through either of his ancestors," mean "and not by descent."

The case was this: *Richard Jacobs*, son of *Joseph*, being seized in fee of the lands in dispute, on the 2d of January 1783, by his last will and testament devised the same to be equally divided amongst his three children, *Joseph*, *Dorsey* and *Rachel*, and their respective heirs, for ever. On the 1st of March 1783, the testator died so seized and without having revoked the said devise. *Joseph* and *Rachel*, the devisees, after the death of the testator, died seized of two third parts of the said lands, in testate, and without issue, some time in the year 1800, and the said two third parts descended to *Dorsey Jacobs*. *Dorsey Jacobs*, a devisee in the will aforesaid, being seized in fee of the lands, died intestate and without issue, some time in the year 1803, leaving no brother or sister of the whole blood, but leaving the lessors of the plaintiff, to wit, *John Jacobs*, his uncle, and the brother of the whole blood to his father *Richard*, the testator, and *Elizabeth Walker* and *Hannah Fowler*, his aunts and the sisters of the whole blood to his said father *Richard*, the testator, at the time of his death left a widow named *Patience*, (the mother of *Joseph*, *Dorsey* and *Rachel*, the devisees aforesaid,) who intermarried with a certain *Jesse Hall*, by whom she had issue *John Hall*, the present defendant, also *Daniel Hall*, *Elizabeth Hall*, *Richard Jacob Hall* and *Sarah Hall*, now *Sarah Cromwell*. On these facts the opinion of the county court was delivered by

CHASE, Ch. J. The question submitted to the court in this case is, whether the uncles and aunts of the whole blood of *Dorsey Jacobs* are to be preferred to his brothers and sisters of the half blood. The question arises under the act to direct descents, 1786, *ch.* 45, *sec.* 2. In expounding acts of assembly, the intention of the legislature is to be regarded, and that intention must be collected from the whole act, or those parts which relate to the subject matter in controversy, and the objects which the legislature apparently had in view. The great and principal object was to prevent the land of the intestate from descending to the eldest son, in exclusion of his brothers and sisters, and to make it descendible to all the children equally, and where there were no children of the intestate, to make it descend equally among his collateral relations standing in the same degree *in stirpe*, or by representative, having regard to the line, paternal or maternal, from which the land descended, and giving a preference accordingly. The mode adopted by the general assembly to find out the persons who among collateral relations, were

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entitled to the land by descent, was by recurring to the lineal ancestors of the intestate, who, though incapable of succeeding to the estate, are the common stock from which the next successor must spring. Another object was to make the brothers and sisters of the half blood inheritable in certain cases. If the land vested in the intestate by purchase, which was not derived from or through any of his ancestors, the brothers and sisters of the half blood of the intestate acquired a capacity of inheriting the land in derogation of the principle of the common law. To make them thus capable, two things or circumstances must concur. The land must vest in the intestate by purchase, and that purchase must not be derived from or through any of his ancestors; the general assembly intending that the course of descent previously established should not be interrupted if the purchase was derived from or through any of his ancestors by will, gift or otherwise, and creating a capacity of inheriting in the brothers and sisters of the half blood in all cases of purchase, except in those in which the land was acquired by the intestate from some one of his ancestors. In all other cases, to ascertain who is the heir, resort must be had to the father, grand-father, &c. as the heir, though long since dead, being represented by the persons of his issue, who succeed, not in their own right, but in right of representation as his offspring. The court are of opinion, that the uncles and aunts of the whole blood of the intestate, *Dorsey Jacobs*, are entitled to the lands in question, and that judgment be entered for the plaintiff for possession and costs.

Upon that judgment the defendant brought a *writ of error* returnable to this court.

The cause was argued at the last June term before Buchanan, Nicholson, Earle, and Martin, J. by *Shaaff* and *Stephen*, for the plaintiff in error, and by *Martin* for the defendant in error. It was reargued at the present term before Buchanan, Earle, Martin and Dorsey, J.

Stephen, for the Plaintiff in error. The question is, whether upon the death of *Dorsey Jacobs*, (one of the three devisees named in the will of *Richard Jacobs*,) without issue, or a brother or sister of the whole blood, or descendant of such brother or sister, the lands devised to him, and his brother *Joseph*, and sister *Rachel*, (both of whom died in *Dorsey's* life-time, without issue,) belongs to the brother of *Dorsey* of the half blood on the side of the mother, (the defendant below,) or to the uncles and aunts on the part of the father, (the lessors of the plaintiff.) The act of descents, (1786, *ch.* 45,) in the first place provides a course through which land shall go, where it *descended* to the intestate on the part of the father, giving a preference to paternal relatives, until the paternal line is exhausted; in that event it directs that the land shall go to the mother, and her

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descendants. It provides in the same manner for the case of land descending to the intestate, on the part of the mother, giving the same preference to the maternal line, as had before been established in favour of the paternal, where the land descended on the part of the father; and ultimately directs, that when the maternal line is exhausted, the land shall go to the father and his descendants. The reason of this principle of preference is manifestly founded upon the superior right or title of that line of ancestors from whom the land *descended*. But where the estate, (as in this case,) was vested in the intestate by *purchase*, and not derived, (as we contend was meant by *descent*,) from or through either of his ancestors, if the intestate dies without issue, and without leaving a brother or sister, of the whole blood, or descendant of such brother or sister, the land of which he so died seized is directed to go, upon such a failure of the whole blood, to the brothers and sisters of the half blood. The land which is the subject of dispute in this case, was devised to *Dorsey*, *Joseph* and *Rachel*, as tenants in common, in fee; upon the death of *Joseph* and *Rachel* without issue, their two thirds became the property of *Dorsey*, as their brother of the whole blood, and consequently their heir at law. In virtue of what provision of the act of descents can the superior title of the lessors of the plaintiff be established or contended for? The act, it is true, has provided for their taking in a certain event; that is, if the land had *descended* to the intestate on the *part of the father*; in such a case they would have had the better title, because they are expressly preferred. But where the land vested in the intestate *by purchase*, the brothers and sisters of the *half blood* are to take upon the failure of brothers and sisters of the *whole blood and their descendants*. If then uncles and aunts are only to take in preference to the half blood, where the land *descended* to the intestate on the part of the *father* or the *mother*, unless this can be shewn to be *such a case of descent*, the defendant certainly has the better title. The words, "*and not derived from or through either of his ancestors*," have alone created any doubt in this case, they immediately following the expressions, "and if the estate is or shall be vested in the intestate by purchase," are supposed to qualify and explain the sense in which the word *purchase* was used, and to confine it to the common acceptation of that term, in contradistinction to its legal and technical acceptation. But this construction cannot be a correct one, because in the event of the death of the intestate to whom (as in this case,) land has been *devised* by the father, without issue, and without brothers and sisters of the *whole blood*, or descendants from such brother or sister, the uncles and aunts cannot establish their title under those provisions of the act which regulate the case of land *descended*. If then they cannot claim it as land which descended to the intestate, they must claim it as land which the intestate acquired by purchase in the technical sense of the ex-

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pression. In the case of lands acquired by purchase in its ordinary sense, the half blood are expressly preferred, and if the expressions, "and not derived from or through either of his ancestors," are construed to exclude the right of the half blood in case of land *devised*, there is no provision in the law directing who shall take; for the lessors of the plaintiff cannot take it as land *descended;* and if they claim it as land acquired by *purchase* by the intestate, in the *technical sense* of the word, it will be found that the act of descents has not made any discrimination between lands acquired by *purchase* in the one sense or the other, in the establishment of its rules of descent; but has only provided for a case of descent or *purchase* in the large, general and comprehensive sense of the latter expression, preferring the uncles and aunts of the whole blood in the former case, and the brothers and sisters of the half blood in the latter. It appears that the true construction of the act of descents is this—that if the estate vests in the intestate by purchase, *or* is not derived from or through either of his *ancestors* by *descent*, that in such case the half blood is entitled, to the exclusion of the uncles and aunts, the word "*and*" should be construed "*or*," and then the provisions of the act will be plain, intelligible and complete. Upon any other construction, it is obvious that difficulties must arise as to the right of inheritance; for in this case the land, which *Dorsey* acquired upon the death of his brother and sister, cannot be said to have *descended* to him either on the part of the *father*, or on the part of the *mother*, his said brother and sister from whom, as purchasers, dying seized in fee, he took by descent, being the children and offspring, as well of the mother as the father; and it being a principle well settled at common law, that a descent from brother to brother is direct and immediate, and is not governed by any reference to the common parent as the *commune vinculum* To the brother and sister, who died in *Dorsey's* life-time, the half blood would have been heirs, if they had survived him, and had died without issue, because they took by purchase, and it is conceived that their dying in his life-time does not affect such right upon the true construction of the act of descents. If such a construction is not given to the words, "and not derived from or through either of his ancestors," what provision is made for the case of property descending from son to father, as may happen in the case of a purchase by the son, or where land descends from husband to wife on a failure of both paternal and maternal relatives? These cannot be called descents on the part of the *father*, or on the part of the *mother*. Where the words of a law are doubtful, the intention of the legislature is to be sought for. The intention here was to abolish the old and establish a new law of descents; of course to make provision for every case that could occur. No other construction than the one contended for by the plaintiff in error, can work this effect. By this construction every case, not a *paternal* or *maternal*

descent, will be governed by the same rules as a case of *purchase*.

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Martin, for the defendant in error. The question in this case is, Whether the lands in dispute descend to the uncle and aunts, or to the half brothers and sisters of the intestate? Of two thirds of the land *Dorsey Jacobs* was seized by descent, from his brother and sister, *Joseph* and *Rachel*; and of the other third he was seized of it under the devise of his father. On behalf of the plaintiff below it is contended, that the two thirds which so descended from *Joseph* and *Rachel*, the brother and sister of *Dorsey*, are to be considered as descending from them on the part of the father, and therefore, on the death of *Dorsey*, the two thirds descended to his uncle and aunts, the children of his grand-father. To establish this claim it will be necessary to consider the law of collateral descent. When feuds first began to be hereditary, the rule or qualification requiring that the heir, who should succeed, must be of the blood of the first purchaser, that is, lineally descended from him. If a vassal died seized of his own acquisition, which was called a *novum feudum*, it would not descend to any but his own offspring, not even to his brother. 2 *Blk. Com.* 220, 221. But if it was an *antiquum feudum*, a feud not acquired by himself, but which had descended to him from his ancestors, then his brothers and sisters, or any other collateral relation who descended, or derived his blood from the ancestor that first acquired the feud, might inherit or take by descent. 2 *Blk. Com.* 221. At length the feudal rigor was so far abated, that a method was invented to let in the collateral relations of the original grantee, by granting the *novum feudum* to be held *ut antiquum*, and then when the lineal descendants failed, you were obliged to look for the collateral relation, who was entitled to inherit, in the same manner as formerly, when the feud had been really *antiquum*, and had been acquired so long time past, that it was no longer known who was the ancestor, to whom the grant had originally been made. And as in those cases it could not be ascertained whether that ancestor was a male or female, the law supposed any of his ancestors, (as the case might require,) to have been the first purchaser or grantee, and therefore admits any collateral relation, so long as there shall be any descending from any ancestor, male or female, to inherit, only preferring the male as being most worthy of blood. 2 *Blk. Com.* 221, 222. When it is known, that is, when it can be traced to the ancestor who first acquired the feud, the strict rule of the feudal law is observed; but when, through lapse of time, the ancestor, who first acquired the feud, cannot be traced, then for want of lineal descendants of the person dying seized, to find what collateral relation shall inherit, we must go up to the father, and examine whether the father hath left any descendants living, and such descendant, as would

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be heir to the father, is the collateral relation entitled to inherit. If there is no descendant from the father, we must ascend to the grand-father, and examine whether he hath left any descendant living, and if more than one, which would be the heir of the grand-father, he being the descendant, who is entitled to inherit as collateral heir of him who died seized. But if there is no descendant of the grand-father, we must still ascend to the great-grand-father, to inquire for his descendants, and if none, we must ascend up to the great-great-grand-father, and so on in *infinitum*, and when we can no longer trace a male ancestor, we must begin with the female, and look for the collateral heir in that line. 2 *Blk. Com.* 222 *to* 225, *and* 226. In all these cases, the descendant of the father takes as heir of the father, on the supposition that the land had descended through the father, and that he had once been seized of it. The descendant of the grand-father, in like manner, takes it as heir of the grand-father, on the supposition that the feud once belonged to the grand-father, and had descended from him. In like manner the descendants of the great-grand-father take, and so on as far as the ancestral descendants can be traced. 2 *Blk. Com* 226. To apply these principles to the present case—When *Joseph* and *Rachel* died, they left no lineal descendants—we therefore must go to their father, and see if there was any of his descendants living. We find that he left a son, *Dorsey Jacobs*. *Dorsey* then is their collateral heir, and inherits, and the reason he inherits is, because the father is supposed to have been once seized of the land, and that it descended from him. Hence, therefore, *Dorsey Jacobs* was, in construction of law, seized of that two thirds as of land descending to him "on the part of the father." Such would be the result had either *Joseph* or *Rachel* alone been seized of the two thirds under the will, or had they both died at the same moment. The result is the same, though each held only one third, and supposing them to have died in succession. For instance, suppose *Rachel* died first, then in consequence of the change made by our law of descents, *Joseph* inherited from *Rachel* one sixth of the lands devised, and *Dorsey* the other one sixth. *Joseph* then was seized of three sixths of the land, of two sixths by the devise, and of one sixth in consequence of *Rachel's* death, which one sixth he is considered to have taken by descent on the part of the father, for the reasons already assigned. *Dorsey* was also seized of three sixths, two sixths under the devise, and one sixth in consequence of *Rachel's* death, and that he took as descending "on the part of the father." When therefore *Joseph* died, the three sixths, of which he was seized, descended to *Dorsey*, as *on the part of the father*, so that he was ultimately seized of the whole, being seized of two sixths by the devise; of one sixth, which descended from his sister, as on the part of the father; and of three sixths, which descended to him by the death of *Joseph*, as on the part of the father. And the same would be the result if

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Joseph had died first, and *Rachel* afterwards had died in the life of *Dorsey*. Thus we conclude that *Dorsey* died seized of two thirds of the land, the same having descended to him "*on the part of the father*," according to the true construction of the act of assembly; in which case it follows, of course, the plaintiff below was entitled to two thirds of the land. As to the other third part, which was devised to *Dorsey Jacobs* by the will of the testator, whether the plaintiff or defendants below are entitled to that must depend on the true construction of the following clause in the act of 1786, *ch.* 45: "And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors," &c. The word "purchase" has two senses or significations. In its largest or most extensive sense, *Littleton* defines it "the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred." Hence, if lands are given or devised to a person, he is said in this extensive sense, to take by purchase, because he must give his assent to the gift or devise to make it valid. 2 *Blk. Com.* 241. *Co. Litt.* 18. *Emerson vs. Inchbird*, 1 *Ld. Raym.* 728. But the word "purchase" in its vulgar sense, is applied only to such acquisitions of land as are obtained by bargain and sale for money, or some other valuable consideration. 2 *Blk. Com.* 241. And certainly every person, but a lawyer, would think it very absurd that it should be said a man had purchased a plantation, a negro, or any other thing, which had been freely given to him or devised to him If the word purchase in this act is to be taken in its largest and most extensive sense, and perhaps had it been unaccompanied by any other words it ought to have been so taken, that third of the property would undoubtedly descend to the half blood. But it appears that the word purchase *here* is not meant to be taken in its largest and most extensive sense, but to a certain degree in its vulgar and confined sense; and that the words "and not derived from or through either of his ancestors," meant so far to restrain the extensive sense as to prevent its extending to a free gift, or a free devise of land, from an ancestor. A free devise is where the devisee is to take the land without paying any consideration for it. It cannot be said that by the words "not derived from or through either of his ancestors," no more is meant than "not descended from either of his ancestors." The word "*derived*" has a more extensive sense than the word "*descended.*" Lands are "*derived*" from an ancestor, it is true, which have *descended* from him, but so are lands *derived* from an ancestor, which *are given by him*; so also those which *are devised by* him. Lands may be derived from an ancestor by descent, by gift, and by devise. Had the legislature by the words "and not derived," meant the same only as "not descended," as in the former part of the law, they had provided how lands, which had descended on the part of the paternal ancestor, should go, and who should take, when the lands descended from

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the maternal ancestor, they would have gone on and said, "And if the estate *is* or shall not be vested in the intestate by descent from either of his ancestors, then." &c. This would have left no ambiguity; or if they had intended the provision to have extended to all kind of purchases, in its most extensive signification, they certainly would have used the expressions, "And if the estate is or shall be vested in the intestate by purchase;" and have omitted the additional expressions, "and not derived from either of his ancestors." It cannot be conceived that there should be any reason for the use of these expressions, "and not derived from or through either of his ancestors," except that it was their intention to restrain the most extensive sense of the word "purchase," so as to exclude therefrom gifts and devises of land made by him. And it appears reasonable that those cases should be excepted from the provision which entitles the half blood to inherit; and that the same collateral relations should inherit lands of which the intestate was seized by the gift or devise from the ancestor, who would have inherited had the intestate been seized by descent from the ancestor. No consideration had passed to the ancestor, nor had his estate, in which those collateral heirs were interested, been increased or benefited in one case more than in the other. Why then should not those collateral heirs have the benefit of the land on the intestate's dying seized without issue, in the one case as in the other? On the other hand, as no consideration was given by the intestate for this land, and consequently that estate is not diminished or lessened, to which collaterals of the half blood have a right to succeed, and in which they are interested, and of course they are no ways injured—why should they be benefited by this property so devised, at the expense of those collaterals, who would have been entitled to it, had it descended to the intestate instead of being devised to him? Such appears to be the true construction of that clause, and the reason which induced the legislature to make the provision. If these ideas are correct, then *Dorsey Jacobs* was seized of that third part by purchase, but not by such purchase as that clause operates on—and being seized by purchase, we must look for the collaterals that shall inherit, by going up to the father of *Dorsey Jacobs*, and seeing if he has left descendants, if he had they would inherit, but as we find no descendant from him living, we must go up to the grand-father of *Dorsey Jacobs*, and we find that the lessors of the plaintiff are his descendants, and they are therefore the collaterals who are entitled to the land.

Buchanan, J. delivered the opinion of the Court. It appears from the case stated, on which the judgment of the court below was founded, that *Richard Jacobs*, son of *Joseph*, in the year 1783, died seized in fee of the land for which this suit was brought, having first made his last will and testament, whereby he devised it

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in fee to his three children, *Joseph Jacobs*, *Dorsey Jacobs*, and *Rachel Jacobs*, as tenants in common; that after the death of the testator, sometime in the year 1800, *Joseph* and *Rachel Jacobs*, two of the devisees named in the will, died seized in fee of two thirds of said land, intestate and without issue, which two thirds thereby descended to *Dorsey Jacobs*, the other devisee in the will mentioned, who being seized in fee of the whole of the land, died sometime in the year 1803, intestate and without issue, leaving no brother or sister of the whole blood, or descendant of such brother or sister, but leaving three brothers and two sisters of the half blood, to wit, *John Hall*, the defendant in the court below, *Daniel Hall*, *Richard Jacobs Hall*, *Elizabeth Hall* and *Sarah Hall*, now *Sarah Cromwell*, children of his mother by a second marriage, and also an uncle and two aunts, who are the lessors of the plaintiff, to wit, *John Jacobs*, the brother of the whole blood to his father *Richard Jacobs*, the testator, and *Elizabeth Walker* and *Hannah Fowler*, his father's sisters of the whole blood. And the question for consideration is, to whom did the land descend on the death of *Dorsey Jacobs*—to his brothers and sisters of the half blood—to his uncle and aunts of the whole blood on the part of his father equally, or to his uncle *John Jacobs* alone, to the exclusion of his two aunts *Elizabeth Walker* and *Hannah Fowler?* And this must depend upon the provisions of the act of assembly of this state, entitled, "An act to direct descents," 1786, *ch.* 45, *Joseph*, *Rachel* and *Dorsey Jacobs*, having all died since the passage of the act. It no where appears whether *Joseph* or *Rachel* died first, but that is not material, the result is the same. *Dorsey Jacobs* became seized in fee of the whole of the premises in the declaration mentioned, one third by purchase under the will of his father *Richard Jacobs*, and the other two thirds by descent from his brother and sister *Joseph* and *Rachel*, under the operation of the act of descents. As to the one third of the land which *Dorsey Jacobs* acquired under the will of his father, it is contended, that though it was vested in him by purchase in technical understanding, yet that it was not such an estate by purchase, in the meaning of the act of descents, as can descend to his brothers and sisters of the half blood. The act, after providing a course of descents for estates descended to an intestate on the part of the father, and also for estates descended on the part of the mother, has this provision: "And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants, in equal degree equally; and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood, and their descendants, in equal degree equally," &c. And it is said,

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that the word "*purchase*," as here used, is not to be taken in the full extent in a technical or legal sense, but must be considered so far restrained by the subsequent words, as not to embrace estates acquired by deed or devise from an ancestor; and the opinion of the court below goes upon the ground that the words, "and not derived from or through either of his ancestors," were used to qualify and limit the words "vested by purchase," and to distinguish an estate by deed or devise from a parent or other ancestor, from all other descriptions of purchase. And if that construction of the act of assembly be right, the lessors of the plaintiff are not entitled to recover in this action, for it is manifest that the one third of the land which went to *Dorsey Jacobs* under the will of his father, was not derived by descent, but was an estate by purchase, and is not therefore within that branch of the act which directs the manner in which lands shall pass from an intestate that came to him by descent; and if an estate acquired by deed or will from a parent, or other ancestor, is not an estate by purchase, within the meaning and intention of the act, and cannot for that reason pass by descent from the purchaser to his brothers and sisters of the half blood, it is a description of estate not provided for by the act, and must go as at common law. Hence it would follow, not only that the brothers and sisters of *Dorsey Jacobs* of the half blood would not be entitled to inherit the one third of the land so acquired by him, but that *John Jacobs*, one of the lessors of the plaintiff, would take it as heir at law to *Dorsey Jacobs*, to the exclusion of his sisters, *Elizabeth Walker* and *Hannah Fowler*, the other lessors.

But such a construction cannot prevail. The act of assembly employs throughout the technical terms *seized*, *descent*, *purchase*, which must be understood in their legal sense. An estate by purchase is one acquired by sale or gift, or by any other method, except only that of descent. The law knows no such distinction, as is here set up, between a gift or devise by a stranger, and a gift or devise by an ancestor, and there is nothing in the act of assembly to warrant us in sustaining it. It would seem like bending the law to the particular case, rather than the case coming within the provisions of the law.

The legislature have used the words, "and not derived from or through either of his ancestors," to explain their meaning of the word "purchase." In doing this they have borrowed the language of the common law, and it is difficult to suppose that they intended to change the legal import of the term by adopting the legal definition of it. Without using the term "descent" or "descendant," no set of words could be selected better suited to the purpose of describing an estate by descent than the words "derived from or through an ancestor," the term "derived" being properly applicable to a case of descent, and the word "through" of necessity implying it, since a purchase cannot be through any one. The words "and not derived

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from or through either of his ancestors," can therefore only be taken to mean, "and not by descent," leaving the word "purchase" to be understood in its technical and most comprehensive sense, and the whole clause to be construed as if, instead of the words "by purchase, and not derived from or through either of his ancestors," the language employed was by purchase, and not by descent. In this view of the subject, the estate which was vested in *Dorsey Jacobs*, by purchase under the will of his father, is embraced by the act of assembly, and on his death descended to his brothers and sisters of the half blood. With respect to the two thirds of the land which were vested in *Joseph* and *Rachel Jacobs*, by purchase, under the will of their father *Richard Jacobs*, there appears to be more difficulty. Whatever the intention of the legislature may have been at the time of the passage of the act of descents, it is very clear that they have not in terms provided for more than three classes of cases; *first*, estates descended to the intestate on the part of the father; *secondly*, estates descended to the intestate on the part of the mother; and *thirdly*, estates vested in the intestate by purchase, and not derived from or through either of his ancestors. And there being no other cases provided for, if this case does not fall within either of these classes, it is not embraced by the act, and cannot descend either to the brothers or sisters of *Dorsey Jacobs* of the half blood, or to the lessors of the plaintiff equally. To which then, (if to either,) of these three specified classes does it belong? Is it an estate by purchase? In a technical sense it certainly is not, nor is it in vulgar understanding. It is not therefore embraced by the third branch of the act, which provides for estates "vested in an intestate by purchase, and not derived from or through either of his ancestors," unless that clause can be understood to mean that every acquisition of lands, except by descent, paternal or maternal, shall be held and considered to be an estate by purchase. The general intent of the legislature may often be gratified by construction, where the expressions used are of doubtful meaning, but never when it cannot be done without manifest violence to both the ordinary and legal import of the terms employed. Had they expressly declared that all estates, except those by descent on the part of the father or mother, should be deemed estates by purchase, though that would be giving to the word "*purchase*" a signification not before known to the law, yet it would govern all estates coming within that legislative description. But they have not said so in terms, and there is nothing in the whole clause from which such an intention can be inferred; and to give it such a construction, contrary to the obvious meaning of the words, whether technically or vulgarly understood, merely upon the supposition that it was not the intention of the legislature to exclude from the operation of the act any description of estate, and because no other provision of the act could be found to embrace it, would be arbitrary and dan-

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gerous, and at variance with every known rule of construction. If it was the intention of the legislature to provide in the third clause by the description of "estates vested by purchase," for all estates not descended *ex parte paterna* or *ex parte materna*, they have not made use of words to effectuate that intention, and a court of law cannot supply the omission. Nor is it believed that they intended that clause to have such operation. It is not therefore an estate that vested in the intestate by purchase, and did not descend to the brothers and sisters of *Dorsey Jacobs* of the half blood; and it is equally clear that it is not an estate which descended to the intestate, either on the part of the father or on the part of the mother, and is not within either of the two classes of cases first specified, and could not therefore descend to the lessors of the plaintiff equally. But it was vested in *Dorsey Jacobs* by immediate descent from his brother and sister *Joseph* and *Rachel*, a course of descent expressly directed by the act of assembly in the case of a purchaser, who dies intestate, leaving no child or descendant, and is known also at common law. This then being neither the case of an estate descended to the intestate on the part of the father, an estate descended to the intestate on the part of the mother, nor an estate by purchase, but a descent from brother to brother, it is not within the act of assembly, and is a *casus omissus*, subject to the rules of the common law governing descents. The lessors of the plaintiff cannot therefore take it by descent equally, which they could only do had it been vested in the intestate by descent *ex parte paterna*. By the common law, if a man purchases land, he is by fiction understood to hold it *ut feudum antiquum*, not as land descended either *ex parte paterna* or *ex parte materna*, for the law will not ascertain it, but as an estate derived to him from some unknown ancestor; and if he dies intestate and without issue, it will go first to the heirs on the part of the father, and on failure of such heirs, then to the heirs on the part of the mother, the males being always preferred to the females, and amongst males the right of primogeniture prevailing. And so in this case, the land in question having passed by immediate descent to *Dorsey Jacobs*, from his brother and sister, *Joseph* and *Rachel*, who acquired it by purchase, on his death intestate and without issue, leaving no brother or sister of the whole blood, it descended to his uncle *John Jacobs*, the brother of his father of the whole blood, to the exclusion of his two aunts, *Elizabeth Walker* and *Hannah Fowler*.

JUDGMENT REVERSED. *(a)*

(a) See *Stewart's Lessee vs. Evans*, 3 *Harr. & Johns.* 287.

LANSDALE'S EX'X. *vs.* GHEQUIERE. 1817. JUNE

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APPEAL from a decree of the Court of Chancery. The bill filed on the 1st of August 1810, stated that *R. Ratien* and *N. Konecke*, partners in common in *Baltimore*, finding themselves, from considerable losses, unable to meet their engagements, assembled their creditors, and offered to sell to them, at stipulated prices, considerable property, both real and personal, in full satisfaction of their debts. The creditors, among whom was *T. Lansdale*, the testator of the appellant, acceded to the proposal, and appointed *A. Moncrieff*, *G. Repold* and the appellee, trustees on their behalf, to receive and dispose of the property, to whom *Ratien* and *Konecke* accordingly, on the 31st of December 1795, executed an agreement, stipulating the sale of their property on the above terms. A part of this property consisted of a lot, wharf and warehouse, on *Fell's Point*, estimated in the arrangement at $14,000. *Ratien* and *Konecke* were authorised to sell several pieces of the property assigned to their creditors, and among them this wharf property, at a higher price than the stipulated amount, if they could. They contracted with *T. Lansdale*, the testator, to sell him this wharf property for $14,000, payable in 6, 12 and 18 months, from which was to be deducted any dividends to which *Lansdale*, as a creditor of *Ratien* and *Konecke* might be entitled. This sale was affirmed by the trustees. *Ratien* and *Konecke* had on the 3d of September 1793, bought this property from *R. B. Latimer*, the agent of the state, it having been confiscated, and held his bond for the conveyance, which had not, however, been made, although they had paid the whole purchase money. The contract with *Lansdale* was verbal, but he received at the time an assignment of the bond of conveyance, (upon which he afterwards, on the 17th of December 1796, obtained a deed from the chancellor, who acted for and on behalf of the state,) and possession of the property, and held it until the 16th of February 1799, when he sold it to *W. Bruff*, *D. Chambers* and *B. Baker*, jointly, for $11,000, payable $4,000 in 6 months, $2,000 in 12 months, $2,000 in 18 months, $2,000 in 24 months, and $1,000 in 30 months, with interest. On the 30th September 1796, and the 1st of March 1803, *Lansdale* became entitled to dividends from the proceeds of *Ratien* and *Konecke's* property, to the amount, for the first dividend, of $4,666 67, and for the other $1,425 47, which sums were credited to him on account of the purchase of the property. No other payments were made by him, nor by his executrix since his death. *Bruff*, *Chambers* and *Baker*, paid to *Lansdale*, on account of their purchase from him, various sums of money, which left due on the 14th of April 1802, including interest, only the balance of $3,950 60. If the above balance be paid to the trustees of *Ratien* and *Konecke*, there will then remain a balance due from the estate of *Lans-*

R and K being unable to meet their engagements, assembled their creditors, and offered to sell to them, at stipulated prices, considerable property, both real and personal, in satisfaction of their debts, to which their creditors assented, and A, R and G, were appointed trustees to make sale of the property, and R and K conveyed it to them on the above terms. A part of the property R and K were authorised to sell, and they did contract to sell to T L, one of the creditors, such part, which sale was confirmed by the trustees, and a deed executed the efor to T L. On a bill filed by the trustees against the executrix of T L, to recover the purchase money, or a sale of the property, &c, they claiming to have a lien on it. *Quere* whether or not R is a competent witness?

Will the acknowledgment of the agent of an executrix take a case out of the act of limitations? *Quere.*

Will the following expressions in a will revive a debt due from the testator, which was barred by the act of limitations, viz. "When all my just debts and funeral expenses are paid, I devise," &c? *Quere*

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dale to the trustees on the 1st of March 1803, of $7,063 77, with interest from that date. The bill seeks to have the whole balance paid by the executrix of *Lansdale*, or that the property be sold to pay it, claiming to have a lien on it. *Bruff*, *Chambers* and *Baker*, were ignorant of the claim of the trustees when they purchased and paid part of the purchase money. *T. Lansdale* died in January 1803, having made a will, and devised his property in certain proportions to his wife *Cornelia*, the executrix, and his five children, to wit, *W. M. Lansdale*, *Violetta Lansdale*, *Cornelia*, who intermarried with *P. I. Thomas*, *Eliza*, who intermarried with *J. F. Cox*, and *P. Lansdale*. The will begins, "When all my just debts and funeral expenses are paid, I devise and bequeath as follow," &c. and then proceeds to dispose of his estate. The bill alleges that *W. M. Lansdale* was the agent of the executrix in settling the estate of the testator, and he frequently and fully, within two years before the filing of the bill, admitted the claim, and promised adjustment and settlement, and gave an order on *Bruff* and *Chambers* for a part of it. *Cornelia*, the widow and executrix, and *Violetta* and *Philip*, resided at the time of filing the bill in the District of *Columbia*, and *Eliza* with her husband *J. F. Cox* in *New York*. *B Baker* and *A. Moncrieff*, died before the filing of the bill, and *G. Repold* and *W. Bruff* died since. The bill was filed by *Repold* and *Ghequiere*, as surviving trustees, against the executrix, and heirs and representatives of *T. Lansdale*, and also against *Bruff* and *Chambers*. *Chambers*, *W. M. Lansdale*, *P. J. Thomas* and wife, and *C Lansdale* and *P. Lansdale*, appeared and answered the bill. They do not deny or confess the allegations in the bill, but profess ignorance, and leave the complainants to establish their case by proof. The answer of *W. M. Lansdale*, which by consent was also to be taken as the answer of the executrix and of *P. Lansdale*, concludes thus: "He therefore relies on length of time as a bar to any relief which the complainants might otherwise have had, and claims the benefit thereof at the trial." With respect to the nonresident defendants, *V. Lansdale* and *J. F. Cox* and wife, who did not appear or answer, the bill was taken *pro confesso*. The allegations of the bill were fully supported by the proof taken under the commission issued in the cause. One of the witnesses examined was *R Ratien*. *James P. Boyd*, Esquire, another witness, proved that *W. M. Lansdale*, as the agent of his mother, frequently promised the witness, as the complainant's counsel, to settle the claim, and that the only difficulty was to ascertain the balance due.

The auditor stated an account by the order of the chancellor, to which these exceptions were taken. 1. That the claim of the estate of *T. Lansdale* against *Chambers* cannot be adjusted in this court. 2. That there is no legal and competent proof of the price at which *T. Lansdale* bought the property, the testimony of *R. Ratien* being in-

admissible on the ground of interest. 3. That the evidence afforded by the deed of the chancellor to *Lansdale* of the payment of the purchase money, is disregarded. 4. Because the dividend, to which *Lansdale* was entitled, of *Ratien* and *Konecke's* property, is not legally ascertained, it being done by the complainants and *Ratien*.

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Kilty, Chancellor. (July Term 1815.) The difficulties attending this case have arisen from the careless manner in which the sale was made to *T. Lansdale* by the mere assignment of the bond of conveyance from the state's agent, (to save expense as is alleged in the bill) without any written agreement; and the bond of conveyance is not among the proceedings. As the decree will be in the first place against the executrix, it is necessary to remark on the answer of *W. M. Lansdale*, which by agreement is to be taken for her answer also. This is not the usual way of taking an answer, but as it is agreed to by the parties, it is presumed that no exception will be taken to it. The chancellor has considered the objections to the competency of the testimony of *Ratien*, and is of opinion that they are not supported by what appears. There is no proceeding against *Ratien* and *Konecke* under any insolvent law, but they made the agreement, which is exhibited and proved, with the trustees appointed by the creditors. By this agreement they made an absolute sale, and the trustees purchased the property in question, and *Ratien* and *Konecke* were thereby released from debts to that amount, whatever might arise to the trustees for the property. By the agreement *Ratien* and *Konecke* were to sell the wharf, &c. for the trustees, provided more than the $14,000 could be obtained. They sold it for only that sum, but the trustees have thought proper to affirm their act,, and it does not appear that they are interested in the event of this suit. The answer admits the sale in some degree, but does not admit the price.

As to the plea of limitations or the insisting on it in the answer, it is to be observed, that at law the least acknowledgment takes the demand out of the statute or act, and by a parity of reasoning, there seems to be a sufficient acknowledgment in the answer to have that effect. The trust created by the will is also relied on. Nothwithstanding the reversal of the decree in the case of *Blakeway vs. The Earl of Stafford*, 2 *P. Wms.* 373, the chancellor is of opinion that the doctrine recognized in *Precedents in Chancery*, and other authorities, as to the trust created by a charge on the estate for payment of debts, and their being thereby taken out of the statute of limitations, is not overruled or changed. That such charge may be made without express words, as in the case of *King vs. King & Ennis*, 3 *P. Wms* 358, in which the devise was "that after all the testator's debts paid, the rest and residue of his real and personal estate should go to his son;" and that although the cases generally speak of charges on the real es-

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tate, a devise of the personal estate, either express or implied, would have the same effect; and would not be merely void, as suggested in the note in the case of *Jones vs. Strafford*, 3 *P. Wms.* 89, but would form rather a stronger ground.

Although the property purchased is clearly liable to the sum remaining due from *Chambers*, and probably for the whole of the balance due to the surviving trustee, it seems to be the most proper course to decree the payment in the first place from the personal assets of *T. Lansdale*, leaving his representatives after the payment, to recover what is due from *Chambers*—More especially from the letters of *W. M. Lansdale* exhibited, and his order on *Bruff* and *Chambers* to pay the balance due from them towards the present claim, by which it appears that *T. Lansdale* had received £3159 1 3 for the warehouse in question. The prayer of the bill also is that the personal estate of *T. Lansdale* should be first resorted to, and on failure thereof his real estate, and particularly the warehouse sold, on which a lien is claimed. The answer admits a sufficiency of assets, and the auditor's report has ascertained the amount. Exceptions have been filed to that report, which have been considered on the final hearing, and are adjudged insufficient. In regard to the exception as to the amount of the dividends of *T. Lansdale* as a creditor of *Ratien* and *Konecke*, it is to be remarked, that it was incumbent on the defendants to show the amount of them. *Decreed*, that the defendant, *C. Lansdale*, executrix of *T. Lansdale*, pay to the complainant, or bring in, &c. the sum of $3950 60 with interest thereon from the 14th of April, 1802; and also the sum of $7063 77, with interest thereon from the 1st of March 1803, and costs. From this decree the defendant, *C. Lansdale*, appealed to this court.

The cause was argued before Chase, Ch. J. and Buchanan, Earle, Johnson, Martin and Dorsey, J.

Magruder and *Stephen*, for the Appellant. 1. The *first* question is, whether this court ought to consider the acquiescence in this case a presumptive satisfaction? In *Sturt vs. Mellish*, 2 *Atk.* 610, Lord *Hardwicke* considered an acquiescence of 14 years sufficient for that purpose. In *England* the time of limitation is six years, in this state it is three years. By analogy the ground to presume satisfaction is much stronger in this case, than it was in the case referred to.

2. The *second* question is, whether this debt can be revived by the supposed trust contained in the will? In *Lacon vs. Briggs*, 3 *Atk.* 105, Lord *Hardwicke* said "there must be a direct admission of a debt to take it out of the statute of limitations." It seems to be the doctrine of a court of equity that a *trust* shall only take a debt out of the operation of the act of limitations, where the proof of the debt is *clear* and *unquestionable*, not *where an account is to be taken*. At law limitations is a com-

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plete bar. The only ground upon which a trust in equity will take the case out of the operation of the act of limitations, is that the debt is due in *equity* and *conscience*. A debt can only be due in *conscience* where the proof is *clear* and *unquestionable*. If the debt be *doubtful* it cannot be *conscientious*. *Lewis vs. Bacon*, 3 *Hen. & Munf.* 89. *Smith vs. Porter*, 1 *Binny's Rep.* 209.

8. *Ratien* is not a competent witness in this case.

Winder and *Moale*, for the Appellee. The questions are, 1. Whether the appellee has stated and proved a case which entitles him to the relief prayed?

2. Whether if his case in point of fact and law be sufficient, it is not barred by limitations?

1. Under the *first* question the competency of *Ratien* as a witness will be involved. He can be incompetent *only* upon the ground of interest. He must either *gain* or *lose* by the event of this suit. He cannot gain, because he hath parted with all his right and estate in the property. It was an absolute sale to the trustees, unconditional, without any residuary interest or claim or trust for his benefit.

2. The acknowledgment by *W. M. Lansdale*, one of the devisees and the agent of the executrix, takes the claim out of the act of limitations, and rebuts all presumption of payment from length of time. They referred to *Burt vs. Palmer*, 5 *Esp. Rep.* 145. *Matthews vs. Haydon*, 2 *Esp. Rep.* 529, and the case of *Palethorp vs. Furnish*, there cited. 4 *Bac. Ab.* tit. *Limitation of Actions*, (E 8) 484, and the cases there referred to.

3. By the will of *T. Lansdale* a trust was created for the payment of his debts. The will directs "and *when* my just debts and funeral charges are paid, I give and devise," &c. These words raise a trust for the payment of debts. This devise charges the real estate with the payment of all debts due from the testator, and creates a trust to be executed by his executrix for that purpose, and his creditors are the *cestui que trusts*. *Trott vs. Vernon*, 2 *Vern.* 708. S. C. *Prec. in Chan.* 430, *Bowdler vs. Smith*, *Prec. in Chan.* 264. *Newman vs. Johnson*, 1 *Vern.* 45. *Beachcroft vs. Beachcroft*, 2 *Vern.* 690. *Gilb. Eq. Rep.* 111. *Harris vs. Ingledew*, 3 *P. Wms.* 91. *Prec. in Chan.* 37. *Wareham vs. Brown*, 2 *Vern.* 153. *Parker vs. Wilcox*, 8 *Vin. Ab.* 489, *pl.* 25. A trust thus created hath been held to revive a debt barred by the statute of limitations. *Anon.* 1 *Salk.* 154. *Andrews vs. Brown*, *Prec. in Chan.* 385. *Gofton vs. Mill*, *Ibid* 9. S. C. 2 *Vern.* 141. *Trueman vs. Fenton*, 2 *Cowp.* 548. *Lacon vs. Briggs*, 3 *Atk.* 107. *Blakeway vs. Strafford*, 2 *P. Wms.* 373. *Jones vs. Strafford*. 3 *P. Wms.* 89. (and *note* 1.) *Oughterloney vs. Powis*, *Ambl.* 231. 4 *Bac. Ab.* 484. 7 *Bac. Ab.* tit *Uses & Trusts*, 138. *Stackhouse vs. Barnston*, 10 *Ves.* 453.

Magruder in reply.

DECREE AFFIRMED.

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BURROUGHS's Adm'r. vs. NEGRO ANNA.

Burroughs vs Negro Anna

APPEAL from *Saint Mary's* County Court. A petition for freedom filed by the appellee against the appellant.

L B by his will dated in 1811, bequeathed freedom to his negro woman A, who was above the age of 45 years; he also bequeathed to her the advantages of her son as a labourer so long as she lived, and a young bay mare, and four barrels of corn, 300 weight of pork, a cow, hoe and axe, and sundry other articles; and that her son J be the entire right and property of the said A—*Held*, that under the act of 1796, *ch* 67, prohibiting the manumission of any slave above the age of 45 years, &c. A was not entitled to freedom.

The facts as agreed upon were these: The petitioner was the slave of a certain *L. Burroughs*, deceased, who by his will, dated the 12th of September 1811, bequeathed as follows: "I give and bequeath unto my negro woman called *Anna*, her liberty, and the advantages of her son as a labourer, so long as she lives, and a young bay mare three years old next spring, and four barrels of Indian corn, and three hundred weight of pork, and one black cow about six years old, and a hoe and an axe, and a spinning wheel, and cards, cotton cards, and one iron pot, holding three gallons or thereabouts, and half a dozen pewter plates, and the balance of the wool after clothing the family, and one young white sow, and all the dunghill fowls, and half a barrel of wheat; also it is my will and desire that my man *Josias*, her son, be the entire right and property of her the said *Anna*." The will was duly proved and admitted to record. The petitioner is the negro *Anna* mentioned in the will and petition, and at the time of the death of the testator, she was above the age of *forty-five* years. The testator died during the present year, (1815,) and the defendant is his administrator. The county court, [*Johnson*, Ch. J.] gave judgment upon these facts for the petitioner, being of opinion that she was entitled to her freedom. From this judgment the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, MARTIN, and DORSEY, J.

Magruder and *C. Dorsey*, for the Appellant, referred to the acts of 1715, *ch.* 44, *s.* 22, and 1796, *ch.* 67, *s.* 13, 29.

Stephen, for the Appellee, referred to the act of 1796, *ch.* 67, *s.* 29. Stat. 1 *Edw. II. st.* 2. Stat. 2 *Westminster*, *ch.* 12. 6 *Bac. Ab.* tit. *Statute*, (I 5, 6) 384, 385, 386, 387. 1 *Tucker's Blk.* part 2. 2 *Bac. Ab.* tit. *Error*, (K 4) 490, 491; and *Zouch vs. Parsons*, 3 *Burr.* 1794.

JUDGMENT REVERSED, *(a.)*

(*a*) See this case referred to by the Court in *Hamilton vs. Craggs*, 6 *Harr. & Johns.* 19.

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J M, being the owner of certain goods, &c. on the 9th of January 1807, shipped them at *B*, to be carried to *C*, for his sole account and risk, and consigned to J O as his agent and supercargo, for sale. The captain of the vessel on the same day signed three bills of lading, one retained by J M, one delivered by him to J O, one to the captain, with an affidavit of J M, made on the next day, with the knowledge of J O, that he was the owner of the goods. Before the 10th of January 1807, it was agreed upon between J M and J O, that the latter was to sail as the consignee and supercargo of the goods; and it was agreed in writing, that the goods should be considered on their joint account, that is, two third to J M, and the other third to J O. After the execution of the agreement, and on the same day it was agreed between J M and J O, that in consideration that J O would become an endorser on sundry promissory notes about to be given by J M to the persons of whom he had purchased a part of the goods; J O should retain and have a lien on the whole of the goods, and the proceeds arising from the sale thereof, to reimburse and indemnify him. J O did endorse such notes, and had paid them, J M becoming insolvent and failing to do so. The vessel sailed on the 13th of January 1807, and arrived at *C*, and the goods were delivered to J O, who sold them, and invested the proceeds in a return cargo, which he shipped on board the same vessel for *B*. the captain giving to J O a bill of lading and manifest, stating that the goods had been shipped for the joint account and risk of J M and J O, and to be delivered unto J M and J O, or their assigns. It was alleged that the bill of lading was originally made out, consigning the goods to J M alone, and afterwards, and with different ink, the words "*and J O*" were interlined, and the word "*his*" altered into the word "*their*." On the 2d of March 1807, J M applied to P K for the loan of his promissory notes, and P K did loan to him his promissory notes, and to guarantee P K against any loss. J M assigned to P K the bill of lading first herein mentioned, invoice and policy of insurance for the goods. Before the return of the vessel to *B*, P K had been obliged to pay the notes he had loaned to J M. P K had no knowledge of the agreement between J M and J O at the time of the assignment of the bill of lading, &c. On the arrival of the vessel at *B*, with the return cargo on board, on the 22d of May 1807, the cargo was delivered to J O. who bonded for and paid the duties thereon to the *U. S.* P K afterwards replevied the goods out of the possession of J C—*Held*, that P K was not entitled to recover.

On a bill filed in chancery, it was decreed, on the above facts, that J O, a supercargo and consignee of the outward cargo, and in virtue of the verbal and written agreement, had a right to retain the inward cargo, and had a lien the con to reimburse himself for all advances made by him, and to satisfy any balance which might be due to him on a final adjustment of the transactions in trade between him and J M. That J O, in making the alteration in the bill of lading did not act fraudulently, nor did he acquire any new rights thereby. He had a right to stop the goods *in transitu*.

Quere. What would have been the situation of the parties if there had been no agreement?

Appeal from *Baltimore* County Court. This was an action of replevin, and at the trial in the county court in April 1809, the plaintiff, (now appellant,) offered in evidence, that one *J. M. Minor*, residing in the city of *Baltimore*, and carrying on the business of a merchant, was the owner of the goods and merchandizes mentioned in the bill of lading herein after mentioned; and being such owner, on the 9th of January 1807, shipped them at the port of *Baltimore*, on board the schooner *Eagle*, commanded by *D. Havens*. to be transported from that port to *Cumana*, in the *West Indies*, for *Minor's* sole account and risk, and consigned to the defendant, (the appellee,) as his agent and supercargo, for sale, and that *Havens*, the captain of the schooner, did on the said 9th of January 1807, sign three bills of lading for the said goods. That one of the bills of lading was delivered by *Minor*, before the sailing of the vessel, to the defendant, one other to *Havens*, accompanied with an affidavit of *Minor* made on the 10th of January 1807, with the knowledge of the defendant, that he was the owner of the goods mentioned in the bills of lading, and the other of the bills of lading was retained by *Minor*. That the schooner cleared out at the custom house in the port of *Baltimore* on the 10th of January 1807, for *Cumana*, and sailed on the 13th of January, 1807, and that the defendant went in her as supercargo. That *Minor* on the 2d of March 1807 applied to the plaintiff for the loan of his promissory notes for his, *Minor's* accommodation, and produced to the plaintiff the said bill of lading, and an invoice and policy of insurance, both of which were for the property mentioned in the bill of lading, as evidences of his property in the said goods, and an assignment of them was offered by him to the plaintiff to guarantee and secure him against all loss from so loaning him his promissory notes; and that thereupon the plaintiff did loan to him his promissory notes to the amount of $4,500, and *Minor* did then assign and transfer, by endorsing his name in blank on the said bill of lading, invoice and policy of insurance, for the said goods, to the plaintiff, as an indemnification and security

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for so loaning him his promissory notes. That after the said endorsements the schooner *Eagle*, with the said goods and the defendant on board, arrived at *Cumana*, where the defendant sold and disposed of the outward cargo, and then with the schooner proceeded to *Laguira*, where he invested the proceeds of the outward cargo in a return cargo, consisting of the goods, &c. mentioned in the writ and declaration in this cause, which goods were marked with the letters *J. M.* only, that the return cargo was shipped on board the *Eagle* at *Laguira* by the defendant; and *Havens*, the master of the schooner, under the authority, and with the approbation of the defendant, signed the following bill of lading and manifest, viz. "Shipped in good order and well conditioned by *James Owings*, in and upon the good schooner called *The Eagle*, whereof is master for this present voyage *D. Havens*, and now riding in the port of *Laguira*, and bound for *Baltimore*, to say 168 barrels of coffee," &c. "for the joint account and risk of the said *Owings* and *John M. Minor*, being marked" &c. "to be delivered," &c. "unto Messrs. *John M. Minor* and *James Owings*, or their assigns," &c. Dated the 22d of April 1807. Then follows the manifest, &c. Which bill of lading and manifest, so far as the manifest relates to the goods, &c. in the writ and declaration in this cause, were, as the plaintiff contended, upon the exhibition of the bill of lading, and without producing any other proof of the fact, originally made out, consigning the said goods to *Minor* alone, and that afterwards, and with different ink, the words "and *James Owings*," were interlined in the same, and that in the bill of lading the word "*Mr*" was altered into "*Messrs.*" and the word "*his*" into the word "*their.*" That the schooner arrived at *Baltimore* from *Laguira* on the 22d of May 1807, with the said goods mentioned in the declaration on board; and that before the arrival of the schooner at *Baltimore*, the plaintiff had been obliged to pay the promissory notes so loaned to *Minor*. That the defendant on the 9th of January 1807, and for some years preceding, resided in the city of *Baltimore*, and that the same was known to the plaintiff at the time he agreed to receive the endorsement and assignment of the bill of lading, invoice and policy of insurance, as herein before stated. That it is the established custom of merchants in *Baltimore*, when a merchant ships goods to the *West Indies*, and employs a supercargo, to fill up the bills of lading in the same manner as the bills of lading endorsed to the plaintiff by *Minor*, and that the shipper is at liberty to give instructions to the supercargo, directing the particular manner in which he shall manage the goods so committed to his charge, and that the supercargo so made, is considered only as the agent and attorney of the shipper, acting under his authority, and subject to such instructions as he may from time to time receive from his employer; and that a bill of lading and invoice of the goods, are always retained by the

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shipper. The plaintiff further gave in evidence, by cross examination of a witness sworn on the part of the defendant, that he was present at the contract between the plaintiff and *Minor*, relative to the loan of the promissory notes, and saw *Minor* endorse the bill of lading, invoice and policy of insurance, to the plaintiff; and that neither the witness, nor *Minor*, as he heard, did at that time, or at any other time, to the knowledge of the witness, inform the plaintiff of the agreement between *Minor* and the defendant, as hereinafter mentioned, or of any interest which the defendant had in the said goods, other than as mere supercargo. And that the agreement was drawn up in the hand-writing of the witness, and was executed in his presence, and that he was privy to the arrangements between *Minor* and the defendant relative to the said goods, as hereinafter stated. The defendant gave in evidence, by a competent witness, that during the month of January 1807, and for a considerable length of time previous thereto, he acted as clerk to *Minor*, and that during the beginning of the said month of January, *Minor* purchased sundry goods and merchandize of divers persons in the city of *Baltimore*, which on the 8th and 9th of that month he loaded and shipped on board the schooner *Eagle*, whereof *D. Havens* was master, which merchandize is more particularly described by the original invoice thereof, and the bill of lading delivered to the defendant by *Minor* before the sailing of the schooner, and which invoice and bill of lading the defendant read in evidence. The said witness further gave in evidence, that antecedently to the 10th of January 1807, it was agreed upon between *Minor* and the defendant, that the latter was to sail as the consignee and supercargo of the said merchandize, shipped as aforesaid on board the said schooner. That on the 10th of January aforesaid, it was agreed and concluded on between *Minor* and the defendant, that the said goods should be considered on the joint account of *Minor* and the defendant, agreeably to the memorandum of agreement then drawn up by the witness, and signed and sealed by *Minor* and the defendant, and delivered to the defendant by *Minor* in the presence of the witness, who attested the same. Which said agreement, produced by the defendant, admitted as evidence by the parties, is as follows, viz. "It is the understanding and agreement by and between *John M. Minor* and *James Owings*, that the goods shipped by *John M. Minor* on board the schooner *Eagle*, *Daniel Havens* master, for *Cumana* and a market, are and shall be considered on the joint account of the parties; that is, the two thirds to said *Minor*, and the other third to the said *Owings*. And we consider ourselves bound to pay each our proportion for the said goods and insurance when due, as well as necessary charges. The said *Owings* is to receive a commission on the sales and purchases with the proceeds, the same as from other shippers by the vessel, and the same freight, and payable at

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the same time as the said *Owings* has to pay the said *Havens*, as per charter party." The witness further gave in evidence, that after the execution of the said agreement, and on the same day, upon a further consideration between *Minor* and the defendant, it was agreed between them, that in consideration that the defendant would become the endorsor on sundry promissory notes about to be given by *Minor* to sundry persons of whom he had purchased a part of the said goods, and on account thereof, the defendant should retain and have a lien upon the whole of the said goods, and the proceeds arising from the sale thereof, to reimburse and indemnify him for all sums of money which he should pay on account of the said endorsements, or which were therefore, or should thereafter, become due and owing from *Minor* to the defendant. That the defendant, on the faith of such agreement, endorsed the said promissory notes, which were afterwards delivered by *Minor* to the vendors of the said goods; and which notes, it is admitted by the parties, have been satisfied and paid by the defendant, upon *Minor's* having become insolvent and failing to do so—which said promissory notes were produced by the defendant, and read as evidence, with the consent of the plaintiff, amounting in all to the sum of $4642 41. The defendant further offered evidence, that he entered on board the schooner *Eagle*, and sailed from the port of *Baltimore* on the 13th of January, 1807, for the port of destination, where she arrived, and at which port *Havens*, agreeably to his bill of lading, delivered the goods to the defendant, who sold and disposed of the same, and invested the proceeds thereof in a return cargo at the port of *Laguira*, where the same was shipped by the defendant on board the *Eagle*, whereof *Havens* was master, and for which return cargo *Havens* gave to the defendant the bill of lading now produced by the defendant and read in evidence, and which is herein before mentioned. The defendant further offered evidence, that the *Eagle* sailed from *Laguira* with the return cargo, and the defendant on board, and arrived at *Baltimore;* that upon her arrival *Havens* returned to the custom house officer of the *U. S* at *Baltimore*, a manifest of the cargo of the *Eagle*, in due form, which was produced by the plaintiff, and read in evidence, with the consent of the defendant, and is relied on by the defendant, and is as herein before mentioned. The defendant also read in evidence, with the consent of the plaintiff, two bonds each for $834 60, given by the defendant, with *C. C. E.* and *S. O.* as his sureties, to secure to the *U. S.* the duties on the said return cargo; which said bonds, it is admitted by the parties, have been satisfied and paid by the defendant. He further offered evidence, that after the arrival of the *Eagle* at *Baltimore*, the said return cargo, mentioned in the last mentioned bill of lading was, in pursuance thereof, delivered to him the defendant, and was by the plaintiff afterwards replevied, and taken out of the possession of the defendant. That

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the value of the said return cargo at the port of *Baltimore* was about $10,382. The defendant then moved the court to direct the jury, that the plaintiff was not entitled to recover upon the above statement of facts. Which direction the Court [*Nicholson*, Ch. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at December term 1811, before Buchanan, Earle and Johnson, J.

Winder, for the Appellant, cited *Coxe vs. Harden*, 4 *East*, 211.

T. B. Dorsey, for the Appellee, cited *Wright vs. Campbell*, 4 *Burr.* 2046. *Hibbert vs. Carter*, 1 *T. R.* 745. *Evans vs. Marlett*, 1 *Ld. Raym.* 271. *Coxe vs. Harden*, 4 *East*, 211, per Lord *Ellenborough*.

JUDGMENT AFFIRMED.

After which *Karthaus* filed a bill in chancery against *Owings*, charging him with fraud, &c. And as a foundation for relief he relied upon the facts stated in the bill of exceptions herein before mentioned, and which were proved, &c. But that the fact of the alteration of the bill of lading was not proved at law. The bill prayed for relief, &c. and also for an injunction to stay proceedings on the judgment at law, which was granted. *Owings* by his answer admitted that the return cargo was shipped in the name of *Minor* only, and that he interlined his own name in the bills of lading and manifest, after he arrived at the port of *Baltimore*.

Kilty, Chancellor, (February Term 1816.) I am of opinion, that the complainant had a property in, or a lien on, the goods composing the return cargo, consigned to *J. M. Minor* under the assignment in the bill of lading of the outward cargo, to the extent of his claim intended to be secured thereby; that this property or lien was not affected by the private agreement between *Minor* and *Owings* previous to the sailing of the schooner from *Baltimore*, the said agreement, under the circumstances disclosed, being considered fraudulent; that the alteration of the bill of lading by *Owings* was a fraud. And that it does not appear from the transcript of the record exhibited, that the whole question as to the fraud was so fully before the court of law, as to preclude this court from considering the case after the verdict, supposing its concurrent jurisdiction not to be otherwise sufficient. The shipment from *Baltimore* was made on the sole account of *Minor*, and the consignment to *Owings* as agent and supercargo, gave him no right to the goods on his own account. The bills of lading delivered to *Owings* and the captain, were accompanied with *Minor's* affidavit that he

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was the owner of the goods. The agreement in writing that the goods shipped should be on the joint account of *Minor* and *Owings*, was inconsistent with the fact appearing on the bill of lading left with *Minor*, and no alteration was made in that and the other bills, although the schooner remained in port three days longer. This written agreement was concealed from *Karthaus* by *Minor*, and also by *Gillet* his clerk, and the witness in the suit at law. The verbal agreement proved by him to have been made the same day by which *Owings* was to have a lien on the goods, was in like manner concealed; and although *Owings* had a right to take a security on account of his endorsements, it should have been done by direct and open means, without leaving in *Minor* an apparent right by which third persons might be defrauded and injured. It is admitted by *Owings* in his answer, that he shipped the return cargo in the name of *Minor* alone, though with the intention of holding the property as part owner; and that he altered the bill of lading after his arrival at the fort near *Baltimore*, by adding for the joint account and risk of *James Owings* and *John M. Minor*. And he states, that it was for the purpose of making an entry at the custom house, and of holding the property under the agreement.

I shall not inquire as to what was necessary to make an entry at the custom house; but as to the other purpose, I consider the act as unauthorised and fraudulent. This fact does not appear from the transcript of the record to have been fully before the court and jury, it being stated in the bill of exceptions that the plaintiff contended that the bill of lading was made out consigning the goods to *Minor* alone, upon the exhibit of the said bill, without producing any other proof of the fact. The probability of the present complainant having had it in his power to produce further testimony as to this fact, is not considered sufficient to prevent the interference of this court. As to its general power in such cases, the opinion of the court of appeals, in their affirmance of the decree, in the case of *Singery vs. The Attorney General*, 2 *Harr. & Johns.* 487, had some bearing on the question. The nature of the decree to be made is next to be considered. The complainant in his bill states, that 168 barrels of coffee, and 6 seroons of indigo, were delivered to him on the writ of replevin; that he caused a part to be sold, which produced the nett sum of $4,061 23 to him, and that he gave the defendant liberty to sell the remainder, which he did, the nett proceeds amounting to $5,207 78, being retained in his hands. A decree to account, which is stated to be one of the objects of the bill, will not be made; but adverting to the proceedings, and the order of injunction, such decree will be passed as will leave the complainant the benefit of what he kept in his hands *Decreed*, that the injunction be perpetual, &c. From which decree the defendant, (*Owings*,) appealed to this court.

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The cause was argued at this term before CHASE, Ch. J. and BUCHANAN, JOHNSON, and MARTIN, J.

Martin and *Moale*, for *Owings*, the Appellant, contended—1. That the appellee was precluded from any relief in equity by the trial at law. 2. That on the merits the equity was with the appellant. They referred to *Caldwell vs. Ball*, 1 *T. R.* 205. *Newson vs. Thornton*, 6 *East*, 21, *(note)* per *Buller*, J.

Winder and *Winchester*, for the Appellee, contended, that independent of the question of fraud and collusion between *Owings* and *Minor*, and admitting that *Owings* really and *bona fide* became the partner of *Minor* as alleged, yet his voluntarily allowing *Minor* to retain in his hands the ordinary and regular documents by which he could represent the property to third persons to be his own, and by this means having induced the appellee to become answerable for him, gave to the appellee such an equitable lien as a court of chancery will enforce in preference to the right of *Owings*.

CHASE, Ch. J. delivered the opinion of the Court. The court are of opinion, that *Owings*, the appellant, as supercargo and consignee of the outward cargo, and in virtue of the verbal agreement proved, and the written agreement by which he became interested in one third of the cargo, had a right to retain the inward cargo, and had a lien thereon to reimburse himself for all advances made by him, and to satisfy any balance which might be due to him on a final adjustment of the transactions in trade between himself and *Minor*. The alteration made in the bill of lading by *Owings* was made for the purpose of enabling him to enter the inward cargo, *Minor* having become insolvent and absconded. *Owings*, in making the alteration, did not act fraudulently, nor did he acquire any new rights thereby; he was the shipper of the goods, and the bill of lading was in his possession, and under his control, and he had a right to stop the goods *in transitu*. So long as *Owings* retained the possession of the goods, he had a lien on them to satisfy all legal demands, and he could not be divested of his possession by *Minor*, or any person claiming under him, until they were satisfied. *Karthaus*, the appellee, in virtue of the assignment to him from *Minor*, stood in his place, and did not thereby acquire an interest in the outward cargo superior to that which vested in *Minor* previous to his making the assignment.

The court are of opinion that the transaction on the part of *Owings* is not tinctured with fraud, and that the decree of the court of chancery be reversed with costs.

It appears to the court that it is not necessary to determine what would have been the situation of the parties if the agreement before mentioned had not existed.

DECREE REVERSED.

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DUVALL, *et al.* vs. GREEN.

Duvall vs Green

A judgment obtained against an executor or administrator of a deceased person, is not evidence on a bill filed in the court of chancery against the heirs or devisees of the deceased, for a sale of the real estate of such deceased

APPEAL from a decree of the Court of Chancery. The bill in this case was filed on the 7th of June 1814, by *Duvall*, as administrator *de bonis non* of *N. Harwood*, and *J. E. Tilly*, (now appellants,) against *M. A Green*, (the appellee,) as the sole heir of *T. Talbot*, deceased. It stated that *Talbot* and *Tilly* were the joint sureties for *W. Goldsmith* in his bond as sheriff, dated the 15th of November 1791, and that suits were thereon brought in the name of the state, at the instance and for the use of *N. Harwood*, against *Tilly*, and the executrix of *Talbot*, and judgments obtained. The judgment against *Talbot's* executrix was signed on the 7th of June 1799; the last *fieri facias* issued thereon the 12th of November 1801, and a *scire facias* afterwards issued to revive the judgment, on the 18th of September 1812 The bill also stated, that the executrix of *Talbot* had fully administered the personal estate of the deceased. That *Tilly* is bound and liable to pay the whole amount of the said judgment, when in justice and equity he ought to be answerable for only one half as joint surety aforesaid. That *Talbot* died seized of a considerable real estate, &c. and that the defendant, a minor, is his sole heir, &c. The bill seeks for a contribution of *Talbot's* moiety of the said judgment, out of his real estate, which had descended to the defendant, a minor, charged, as the complainants alleged, with the payment of one half of the said debt, on the ground of a deficiency of personal assets. The answer of the defendant, by her guardian appointed under a commission issued for that purpose, admitted that *Talbot* and *Tilly* were joint sureties for *Goldsmith*, and that judgments were obtained against *Tilly*, and the executrix of *Talbot*, as stated in the bill. But she alleges and avers, that the said judgment, against the executrix of *Talbot*, has no legal or binding effect upon her in any manner whatsoever, there being no privity between the executrix of *Talbot*, and the defendant. She admitted that the executrix of *Talbot* has fully administered his estate, and that *Tilly* is liable for the whole amount of the judgment. She admitted that *Talbot* died seized of some real estate, which has become vested in the defendant; but she denies that the same was devised charged with the payment of his debts. That the bond was executed by *Tilly* and *Talbot*, as sureties for *Goldsmith*, on the 15th of November 1791, and that the complainants' bill was not filed until the 7th of June 1814; she therefore pleads and insists upon the length of time which has intervened between the execution of the said bond, and the filing of the bill, as a complete bar against the claim set up in the complainants' bill of complaint, and relies and insists upon the act of limitations as a full and absolute defence against any liability for the present or any other demand which may be made against her as holding any part of the estate which belonged to *Talbot* in his life-time.

1817.

Farrow vs Teackle

Kilty, Chancellor, (December term 1815.) The complainants appear to rely on the circumstance of less than twelve years having elapsed between the last *fieri facias* and the *scire facias* to revive the judgment. But I am of opinion, that the ground taken in the answer is correct in point of law, and that the judgment against the executrix cannot affect the heir or devisee. The admission of the execution of the bond does not prevent the relying on the length of time, or pleading the act of limitations; for at law the gist of the action would arise not from the execution of the bond, but from the breaches assigned in the replication. *Decreed*, that the bill be dismissed, but without costs. From which decree the complainants appealed to this court.

The cause was argued before Chase, Ch. J. and Buchanan, Earle, Johnson, Martin, and Dorsey, J.

Brewer, Jr. for the Appellants, contended, 1. That although *Tilly's* claim originated in *Talbot's* bond, yet his cause of action did not accrue until judgment was obtained against the executrix of *Talbot*, by the state, for the use of *Harwood*, and therefore the statute of limitations, if applicable, did not run until that time. 2. That the statute of limitations is not applicable to this case. 3. That if the statute is applicable, its operation is prevented by the judgment against *Talbot's* executrix, and the subsequent proceedings on it. 4. That the statute cannot be taken advantage of by answer confessing the claim.

On the *first* and *second* points he referred to the act of July 1729, *ch.* 25. *Const. Art.* 42; and 4 *Jacob's L. D.* 173.

On the *third* point he referred to the Stat. 4 & 5 *W.* & *M.* 1 *Inst.* 209, a. 2 *Selw. N. P.* 522, 552, 527, 529; and the act of 1785, *ch.* 72, *s.* 5.

On the *fourth* point he referred to *Milf.* 212, *(note* Z.)

Stephen, for the Appellee, cited *Mason's devisees vs. Peter's adm'rs.* 1 *Munf* 487. *Lansdale vs. Ghequiere, (ante* 257;) and *Harwood vs. Rawlings's heirs, (ante* 126.)

DECREE AFFIRMED.

Farrow, *et al.* vs. Teackle.

June.

Voluntary conveyances cancelled, vacated and annulled, being fraudulent and void as to creditors

Where it was unnecessary to make an assignor and a trustee parties to a bill in chancery.

Appeal from Chancery. The bill of the complainant, (now appellee,) stated that *C. Farrow*, one of the defendants, (and one of the appellants,) on the 10th of October 1805, purchased of *Guest, Atterbury & Co.* of the city of *Baltimore*, goods, &c. to the value of $1537 72, for which he gave them his promissory note payable to them, or order, six months after date, which note was by them, for a valuable consideration, endorsed to the complainant. That

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Farrow, on the 21st of November 1806, purchased of *L. D. Teackle*, of *Princess Anne*, other goods, &c. to the value of $1000, for which *Farrow* executed his bond to *Teackle*, payable on or before the 1st of January 1808, which bond was afterwards, on the 28th of May 1807, for a valuable consideration, assigned to the complainant agreeably to law. That *Farrow*, instead of applying the proceeds of the said goods, &c. to the extinguishment of the debts which had been created by their purchase, invested the same in certain lands then belonging to *J. Fleming*, which lands *Farrow*, on the 25th of June 1807, caused to be conveyed to his children, *Juliana* and *Mary*, infants under the age of five years, which said conveyance was further assured to them by deeds dated the 2d of July 1808, and the 21st of March 1809. That *Farrow*, regardless of his promise and obligation, made no provision whatever for the payment or performance of either, but with intent to defraud the complainant, made application to the court of *Somerset* county for the benefit of the insolvent laws of this state, That the complainant caused suits to be instituted on the promissory note and bond, upon which judgments were obtained against *Farrow*. The bill prayed for a subpœna to *Farrow*, and his two children, *Juliana* and *Mary*, to appear, &c. and then and there answer the premises, and abide by such decree as shall be made, &c. The infants answered by their guardian appointed for that purpose by the court, and which is not necessary to be stated. *Farrow* by his answer admitted the purchase of the goods, and his note and bond therefor. That on the 16th of November 1805, he purchased of *J. Fleming* a tract of land, for which he paid the whole amount of the purchase money in the ensuing year. That the said land was conveyed to his daughters, as stated in the bill; but he denies that the same was done with the intention to defraud, but was done to prevent his wife, from whom he had separated, from claiming dower therein. That *L. D. Teackle* had undertaken, by the agreement exhibited, to pay the debt to *G. A. & Co.* and that he always believed the debt had been paid, until the suit was brought to recover the amount from him. That he did not become insolvent until 1810, and that his insolvency was occasioned by losses which took place long after the said conveyance. That *L. D. Teackle* and *G. A. & Co.* have also become insolvent, and he believes the assignments of the note and bond have been made to the complainant by a fraudulent collusion between the complainant, *L. D. Teackle* and *G. A. & Co.* Testimony was taken under a commission, and the cause argued, &c.

Kilty, Chancellor, (December Term 1815,) *Decreed*, that the several deeds of conveyance from *J. Fleming* to *Juliana M. Farrow*, and *Mary J. Farrow*, the defendants, be cancelled, vacated and annulled, and made of no effect, as fraudulent and void; and that the equitable interest of *C. Farrow*, the defendant, of and in the lands mentioned

in the said deeds be sold, &c. From which decree the defendants appealed to this court. 1817. Farrow vs Tackle

The cause was argued before CHASE, Ch. J. and BUCHANAN, JOHNSON, and DORSEY, J.

MAGRUDER, for the Appellants, contended, 1. That the proper parties had not been made; that the assignors of the bill and bond, and the trustee of *Farrow*, who had become an insolvent debtor, should have been made parties. He referred to *Coale vs. Mildred*, 3 *Harr. & Johns.* 278. 2 That voluntary conveyances are valid against creditors, unless they can prove that sufficient property was not left to pay the debts. He cited *Newl. on Cont.* 384. *Hamilton vs. Greenwood*, 1 *Bay's Rep.* 173. *Mitf. Plead.* 114. 3. The bill does not contain sufficient matter. If relief is claimed on the ground of fraud, fraud must be alleged. Here it is not alleged. He referred to *James vs. M'Kennon*, 6 *Johns. Rep.* 543.

J. Bayly, for the Appellee. This proceeding is under the act of 1794, *ch.* 60, *s.* 10, by creditors. All the necessary parties are before the court. The facts set forth in the bill, if true, establish a fraud, for fraud is an inference of law from facts and circumstances. The consideration in the deeds are not meritorious. It must be natural love and affection. *Farrow's* object was to defraud his wife of her dower. Before his divorce he married again, and had the children to whom he had the land conveyed. It was a conveyance to an adulterous illegitimate offspring. He referred to *Greenhow vs. Coults*, 4 *Hen. & Munf.* 485. *Hamilton vs. Russell*, 1 *Cranch.* 309. The trustee need not be a party. The property was not in him, but in the children, and the conveyance to them, as between them and the father, was valid, and therefore, if on a sale there should remain a surplus, such surplus is not to be paid to the father or his trustee, but to the children. If the property is sold under a decree of the chancellor, then the trustee appointed by him supersedes the other trustee—He is to sell, and the chancellor to distribute—*Cui bono* then make the trustee a party? What is to pass, over which he has any control, and what is he to receive?

DECREE AFFIRMED.

1817.
JUNE

HARRIS vs. EARLE'S EX'RS.

Harris vs. Earle

E H by an agreement in writing, engaged, for value received of J E, to assign to him $150 of a judgment recovered by R G against J L by the 20th of August 1810. or to pay to J E $150, with interest. E H obtained from R G on the 15th of July 1810, an assignment of the judgment he had recovered against J L, which was for £75 damages and 6761 lbs tobacco, costs, rendered on the 17th of April 1804, a short copy of which judgment, with the *assignment of R G*, was transmitted by E H to J E before the 20th of August 1810, and which J E refused to receive, and it was returned to E H in July 1811 E H received from J L on account of the judgment $291 30, on the 30th of November 1810, saving, if interest could be demanded on the judgment, a greater amount than $150 In an action of *assumpsit* by J E against E H to recover the $ 50, and interest—*Held*, that he was entitled to recover

APPEAL from *Baltimore* County Court. *Assumpsit.*

1. On a special agreement—to assign a certain judgment to the amount of $150, and interest, or to pay that sum and interest, &c. 2. General *indebitatus assumpsit* for money had and received. *Non assumpsit* pleaded. On the trial the plaintiffs read in evidence the following agreement, which it was admitted the defendant had executed at the period it purports to bear date, viz.

"*Baltimore*, June 26, 1810.

For value received, I do hereby promise and engage to have assigned to *James Earle*, junior, of *Easton*, $150 of the judgment rendered in the late general court for the *E. S.* in the name of —— *Gray*, against *James Lloyd*, on which there was an appeal, and in which appeal bond said *Earle* became the security of said *Lloyd*. And I do hereby promise and engage, that the said $150 of the above judgment, shall be due and free from all prior assignments and incumbrances whatever, and entitled to draw interest from this day till paid; and that this assignment shall be made and delivered to said *Earle* in *Easton* on or before the 20th day of next August, or that I will pay said *Earle* on the 1st day of September the said sum of $150, with legal interest from this day in cash.

Edward Harris."

The defendant then gave evidence, that he did procure the said *Gray*, in said agreement mentioned, who was the *Richard Gray* herein after mentioned, to assign and transfer to him the judgment in said agreement mentioned, a short copy of which judgment, and the assignment thereof by *Gray*, the plaintiff in said judgment, to the defendant, he gave in evidence, being a judgment rendered on the 17th of April 1804, for £75 damages, and 6761 wt. tobacco, costs; and the assignment of said judgment from *Gray* to the defendant, was dated 18th of July 1810. It was admitted by the plaintiffs, that the defendant did, within the time prescribed in said agreement for the assignment therein mentioned, transmit the said short copy of the judgment, and the said assignment thereon, from *Gray* to him, to his agent at *Easton*, with orders to deliver the said assignment and judgment to *Earle*, for the purpose of complying with his engagement of assigning $150 part of the said judgment to *Earle*, which delivery, for the purpose aforesaid, was made by the agent of the defendant. But the defendant never made any written assignment of the said $150, part of said judgment, nor caused the same to be done in any other manner than by the delivery of said judgment and assignment as aforesaid to *Earle*. That *Earle* returned said judgment and assignment from *Gray* to the defendant, sometime in the month of July 1811, and before the institution of the present suit. That the defendant received from *James Lloyd*, on account of the said judgment, the sum of $291 and 30

1817.

Richardson vs Stansbury

cents, on the 30th of November 1810, and after the paper aforesaid, purporting to be an assignment from *Gray* to the defendant, was transmitted and delivered to *Earle*; and that if interest could be demanded and received on said judgment, that there would still have been due and owing thereon a greater amount than $150. The plaintiff then moved the court for their opinion and direction to the jury, that if they believed the facts so given in evidence and admitted, the plaintiffs are entitled to recover. Which direction and opinion the Court, [*Bland*, A. J.] accordingly gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY, J. by

Winder, for the Appellant, and by
Hoffman, for the Appellees.

JUDGMENT AFFIRMED.

RICHARDSON'S Adm'x. vs. STANSBURY.

JUNE.

APPEAL from *Baltimore* County Court. This was an action of *assumpsit* for money had and received. The general issue was pleaded. In the trial the plaintiff, (now appellee,) gave evidence that *Aquila Miles*, late of *Baltimore* county, deceased, appointed by his last will and testament *Arnold Richardson*, (the intestate of the defendant, the appellant,) *John Hutchins* and *Dixon Stansbury*, (the plaintiff,) executors of the said will; and that the said *Richardson*, *Hutchins* and *Stansbury*, took out joint letters testamentary on the said estate. The plaintiff also read in evidence the following administration accounts on the estate of the said *Miles*, rendered to the orphans court of *Baltimore* county, to wit: The 1st account, viz.

Payments and disbursements,	$16.419 92
Balance due the estate,	1,859 71
Estate accounted for,	$18,279 63

Additional account—Balance former acc't.	$1,859 71
Receipts,	254 07
	$2,113 78
Payments and disbursements, $987 92	
Commission to executors on $18,533 70 at 7½ p. c. 1,390 02	
	2,377 94
Estate overpaid,	$264 16

A R, J H and D S, were on the will of A M constituted his executors, and they obtained joint letters testamentary on his estate. An account was settled with the orphans court, and a commission of 7 1-2 p. c. allowed to the executors, which sum was retained by A R, who refused to pay any part thereof to D S, upon the ground that the business of the administration of the estate of A M was done and transacted by him only In an action for money had and received, brought by D S against A R—*Held*, that D S was entitled to recover, and that the jury ought not to make any abatement from his demand because of A R's having solely done and transacted the business of the administration

1817.

Woods vs Schroeder

The plaintiff further gave evidence, that at the time of rendering the said account to the orphans court, there remained in the hands of said *Richardson* the amount of $1125 86, part of the assets of the said estate received by him in course of the administration, and retained by him as so much of the commission allowed by said second account, and that he refused to pay to the plaintiff any part of the said sum so retained by him, the commission so allowed by the orphans court on the administration of said estate. The defendant then gave in evidence, that the business of the administration of the said *Miles's* estate was done and transacted by the said *Richardson* only. The defendant then moved the court for their direction to the jury, that if they believe the evidence so offered, that then the plaintiff is not entitled to recover. But if they should be of opinion that the plaintiff is entitled, then to direct the jury that they may and ought, (if they believe the evidence,) abate the plaintiff's claim, by deducting therefrom such an amount as they should believe a reasonable compensation to be made by the plaintiff to the defendant, for the said *Richardson*, having solely done and transacted the business of said administration. But the Court, [*Bland*, A. J.] refused to give either of the directions above prayed, and was of opinion, and directed the jury, that the plaintiff was entitled to recover, and that the jury ought not to make any abatement from his demand because of the said *Richardson's* having solely done and transacted the business of the said administration. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before BUCHANAN, JOHNSON, and DORSEY, J.

Kell and *R. Johnson*, for the Appellant, cited 1 *Com. on Cont.* 328. 2 *Com. on Cont.* 131. 3 *Bac. Ab.* tit. *Executors*, 32; and *Dale vs. Sollet*, 4 *Burr.* 2133.

Winder, for Appellee.

JUDGMENT AFFIRMED.

JUNE.

WOODS, *et al.* vs. SCHROEDER.

A check payable to bearer passes by delivery, and the bearer of it may sue on it as on an inland bill of exchange, and is entitled to recover in an action on it as such, and for money lent and advanced.

APPEAL from *Baltimore* County Court. *Assumpsit* on an inland bill of exchange payable to bearer, and for money lent and advanced. The general issue was pleaded.

The following case was stated and submitted to the court, viz. It is admitted that the check mentioned in the declaration, and herewith exhibited, to wit:

1817.

Woods vs Schroeder.

"No. 283. *Baltimore*, 5th May, 1813.

Cashier of the Mechanics' Bank of *Baltimore*, pay to No. 283, or bearer, twenty-three hundred sixty-four dollars and eighty-two cents.

Wm. Woods & Son."

2364 dolls. 82 cts.

Was given by the defendants, (now appellants,) and which is under the partnership signature, to a certain *Casper Otto Muller*, who on the day of the delivery thereof passed the same to the plaintiff. (the appellee,) for a valuable consideration. That *Muller*, in consideration of the delivery of the said check to him by the defendants, gave to them in exchange his own check for the sum of $2124 82 cents, and that he paid them the balance in the following manner, viz. $30 in cash, and the residue in a check of *Wightman & Schade*, for the sum of $210, which was paid to the defendants at maturity. That the plaintiff on the 5th of May 1813, presented the said check of the defendants for the said sum of $2364 82 cents, to *Dennis A. Smith*, the cashier of the Mechanics' Bank for payment, which was refused, because the defendants had no funds in bank; and also because the defendants had given directions to the said cashier not to honour the said check, of which non-payment the plaintiff duly notified the defendants. That the check of *Casper Otto Muller* for $2124 82 cents, so given in exchange to the defendants as above stated, was not paid by *Muller* at maturity. The county court gave judgment upon the statement of facts for the plaintiff; and the defendants appealed to this court.

The cause was argued before Buchanan, Johnson, and Dorsey, J.

Harper, for the Appellants, contended, 1. That there was no privity between them and the appellee on which an action could be founded.

2. That this check was not a negotiable paper which could pass by endorsement, and was not endorsed.

3. That it cannot be likened to an inland bill of exchange, drawn by the appellants on the bank in favour of *Muller*; but is a paper of altogether a different character, peculiar to the intercourse between banks and their customers; and

4. That if it could be assimilated to an inland bill of exchange, it could not pass without endorsement, and is not endorsed.

A. H. Boyd, for the Appellee. The check on which the suit is founded, was payable to bearer, and was passed to the appellee for full consideration, and without any notice of an objection to the payment of it by the appellants. It is contended by appellee, on what he believes to be the established principles of law,

1. That a check payable to bearer passes by delivery;

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2. That the bearer may sue on it as on an inland bill of exchange, and is entitled to recover in this form of action.

He cited *Chitty on Bills*, 339, 340. *Boehme vs. Sterling*, 7 *T. R.* 423. *Cruger vs. Armstrong*, 3 *Johns. Cas.* 5. *Grant vs. Vaughan*, 3 *Burr.* 1516. *Hinton's* case, 1 *Shower's Rep.* 235.

JUDGMENT AFFIRMED.

JUNE

HOWARD vs. ROGERS.

J E H by deed of bargain and sale, granted and conveyed to N R a lot or parcel of ground, part of *Lunn's Lot*, and located it as "beginning for the same at the S W corner of E and G streets, and running thence S, binding on E street, 150 feet to C alley, thence W binding on C alley continued 300 feet, to P street, thence N binding on P street 150 feet to G street continued, *which street bounds on the S. the square intended for public uses*, thence E binding on said street from the said square to the beginning." On a bill filed in chancery by N R against J E H. for an injunction to restrain him from applying to private uses, the square intended for public uses, but that he should be obliged to keep it open for public purposes—*Held*, that it was the plain intention of the parties, to be collected from the words of the deed, that the lot therein described should pass, and all J E H's right and interest therein, and nothing else. In the construction of a deed the intention of the parties is to prevail if not incompatible with some rule or maxim of law. The intention is to be collected from the words of the deed as expressive of and defining the meaning of the parties. The deed is to be construed most favourably for the grantee, where there is any doubt about the meaning of the parties. Parol evidence is not to be admitted, nor extraneous circumstances introduced in the exposition of deeds, except in the single instance of a latent ambiguity.

APPEAL from a decree of the Court of Chancery. The appellant being the proprietor of all the lands around the public square in the city of *Baltimore*, as located on the several plots exhibited in the cause, and also of the grounds around the half square to the south of the public square, had, by deeds to *Goldsborough* and *Paca*, appropriated the square to public uses, and had declared and evinced the same in other contracts and acts, and particularly in plots which he had caused to be made of his property, and which plots had been copied into a map of the city, and its vicinity, published in the city in the year 1792. He afterwards, on the 25th of August 1796, made a conveyance to the appellee of a lot of ground in the following words: "Beginning for the same at the south west corner of *Eutaw* and *German streets*, and running thence south binding on *Eutaw street* one hundred and fifty feet to *Cider Alley*, thence west binding on *Cider Alley* continued three hundred feet to a street known by the name of *Paca-street*, thence north binding on *Paca-street* one hundred and fifty feet to *German-street* continued, which street *bounds on the south the square intended for public uses*, thence east binding on said street, and *fronting the said square*, to the beginning." There had been a deed prepared before and executed by the appellant, and delivered to the appellee, in which the expressions relative to the public square were omitted; and the appellee returned it to the appellant, objecting to it on that account, and requiring the words to be inserted for the purpose of giving his lot the privilege of fronting the square, and in consequence thereof the appellant caused a new deed to be drawn, containing the expressions above mentioned. The bill claimed that the appellant should be enjoined from applying that square to private uses, but should be obliged to keep it open for public purposes.

KILTY, Chancellor, (September term 1815.) The bill was filed to obtain an injunction against the defendant, restraining him from leasing, selling, improving, or building upon, a certain piece of ground alleged therein to

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have been intended as a public square, or from appropriating it to any other use. And a decree was prayed to compel the defendant to remove from the said square all buildings and erections thereon made, and to appropriate the square to public uses according to his contract. The injunction was granted. Since which the defendant has put in his answer. Testimony has been obtained by commission and agreement, and the case was set down for final hearing. It was argued at the present term by counsel on each side, and the proceedings have since been fully considered. Although it may possibly be a case of some hardship or loss to the defendant, the chancellor is of opinion, on the whole, that the complainant is entitled to relief, chiefly on the expressions contained in the deed of the 25th of August 1796, which are not contravened by any other agreement, supposing such to be sufficient against the deed. The first agreement or conversation respecting the lot bounding the square on the north No. 992, is not of much importance, and is not considered as having been obligatory on the defendant, or to have absolutely induced him to make the sale in question; though it may serve to show the wishes of the complainant, and the disposition of the defendant to comply with them, and the apparent intention as to the square. The circumstances attending the contract for the lots on *German street*, and the conversation between the parties, would be more material if this was a bill to compel a specific performance of the parol agreement in part executed. But the defendant has by his deed said that *German-street* then bounded on the south the square intended for public uses, and described the last line as fronting the said square. These expressions imply an absolute intention, and the defendant cannot set up by his answer, or prove a different intention or a conditional, if not made known to the complainant and assented to. And he has not produced, in order to rebut the equity prayed, any proof that the contract contained in the deed has been waived or valued by the parties. The strongest ground for supposing it waived by the complainant would be the length of time; but that though of some weight is not judged sufficient for the purpose, even connected with his knowledge of the lease to *Roberts*, because no day was fixed as to the opening or final clearing of the square, and the terms of the lease were not incompatible with its future establishment. And the delay may be accounted for from other circumstances. It is to be observed also that although there has been a considerable degree of remissness and a want of explicitness in both parties, the complainant applied by letter of October 1808, to the defendant respecting the square, the answer to which neither denied nor admitted expressly his right. The deed was not only from its nature the solemn act of the grantor, but was made after time for reflection, and as the answer says not without hesitation, which excludes the idea of surprise as stated by the defendant's counsel, and both parties well able to contract. It remains then to con-

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sider the main ground of defence, to wit, that it is not such a contract as that a court of equity ought to decree a specific performance of it. This objection does not appear to be supported. It was a fair, just and reasonable object with the complainant to have his lots fronting an open square, and it rested with the defendant to repel that object in his contract or (if there had been any misconception) in his deed. The agreement was sufficiently certain as to the location of the square from the plot exhibited (which plot is also material on the main question) and it was mutual and on a sufficient consideration from the price paid for the lots. And the establishment of such a square is not inconsistent with the general policy of a well regulated society. The agreement is also free from fraud, circumvention or surprise on either side—The parties contending only for their respective rights Neither will the performance affect the rights of other persons, the defendant having reserved to himself the power of keeping open the square. The consequence of a decree for the complainant will be that the defendant may *lose* the advantage which a different appropriation of the ground might give him, which is a circumstance that cannot weigh against his contract. On the other hand, by a dismissal of the bill the complainant would lose the object of his purchase as claimed by him, and apparent from the deed which he required and obtained. And his lots would be shut in by other buildings instead of fronting an open square which he had chosen. And notwithstanding the opinions expressed by the witnesses, this court ought not to refuse a suitor his just rights, because other persons think the enjoyment of them would be injurious to him, inasmuch as men are generally the best judges of what will benefit themselves. It is not recollected that any thing was said in the argument respecting the temporary buildings on a part of the square, which are prayed to be removed. But such removal would of course be necessary in opening the square, and would probably take place to make way for other improvements, supposing the decision to be in favour of the defendant. *Decreed*, that the injunction be and the same is hereby made and rendered perpetual. *Decreed* also, that the defendant, his agents, servants, and all others employed by him, be and they are hereby prohibited and perpetually enjoined from using or appropriating the piece or parcel of ground mentioned and described in the complainant's bill as being bounded, &c. from any other use or purpose than as a public square; and that they do perpetually and for ever hereafter surcease, desist, and refrain from selling, leasing, improving, building upon, or in any other manner appropriating or using the said piece or parcel of ground so aforesaid described, for any other use or purpose than a public one. And that the defendant, within twelve months from the date hereof, do remove and take from the said public square, all houses, buildings and erections, of every description, now erected, standing, or being on the said pub-

lic square, so as aforesaid described, or any part thereof. From which decree the defendant appealed to this court.

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The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Harper and *Taney*, for the Appellant. 1. Are the words in the deed from the appellant to the appellee of the 25th of August 1796, a covenant on the part of the grantor, that the said square shall be applied exclusively to public uses?

2. If such be the construction, is it such a contract as equity will compel him specifically to perform?

On the *first* point they referred to *Sugd.* 87, 88, 90, 91, 102. 1 *Fonbl.* 145, *(note b,)* 149, *(note c.)* *Shep. T.* 253, *(note* 1.*)* 1 *Pow. on Cont.* 385.

On the *second* point they referred to 2 *Pow. on Cont.* 221, 222. 1 *Fonbl.* 147, *(note.)* 149, *(note c,)* 356, 358, (and *note.)* *Sugd.* 147, 148.

Martin, *Winder* and *Winchester*, for the Appellee, referred to *Shep. T.* 50. 1 *Pow. on Cont.* 385. *Buchanan's Lessee vs. Steuart*, 3 *Harr. & Johns.* 329.

CHASE, Ch. J. delivered the opinion of the court. The question to be decided in this case lies within a narrow compass, and must depend on the true construction of the deed from *Howard* to *Rogers*, and that construction is to be determined by resorting to some plain well known established rules and principles of law. The intention of the parties is to prevail, if not incompatible with some rule or maxim of law; this is considered as the polar star in expounding deeds—The intention to be collected from the words of the deed as expressive of and defining the meaning of the parties—The deed to be construed most favourably for the grantee, if there is any doubt about the meaning of the parties. Parol evidence is not to be admitted, nor extraneous circumstances introduced in the exposition of deeds, except in the single instance of a latent ambiguity. These principles will guide us to a right decision in this case.

Col. *Rogers* purchased a lot of ground of Col. *Howard*, and by the deed under consideration, *Howard* conveyed the lot to *Rogers*. What are the words of the deed which relate to this question?

Col. *Howard* grants a lot or parcel of ground, part of *Lunn's Lot*, to Col *Rogers*, and locates it in the following manner, to wit: "Beginning for the same at the south west corner of *Eutaw* and *German streets*, and running thence South, binding on *Eutaw-street*, one hundred and fifty feet to *Cider Alley*, thence West, binding on *Cider Alley* continued, three hundred feet, to a street known by the name of *Paca street*, thence North, binding on *Paca street*, one hundred and fifty feet, to *German-street* continued, which street bounds on the south the square intended for public

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Henderson vs Negro Tom.

uses, thence East binding on said street, and fronting the said square to the beginning."

There is not any thing mentioned in the granting part of the deed but a lot of ground part of *Lunn's Lot*. These words "Beginning," &c. are a description of the lot, and designate the location of it, and shew in a plain manner where it lies. The words "*which street bounds on the South the square intended for public uses*," were inserted to render the description more certain, and identify more plainly the said lot; these words convey no right, interest or privilege in the square. The words "*binding on the said street, and fronting the said square to the beginning*," are also words of description, and are susceptible of the same answer.

The deed in this case is free from doubt. Indeed there is not the semblance of ambiguity in it; and parol evidence cannot be received to explain the deed, or to shew that any thing passed but what is mentioned in the deed. It was the plain intention of the parties, to be collected from the words of the deed, that the lot therein described should pass, and all Col. *Howard's* right and interest therein, and nothing else.

The court are of opinion, that the decree of the court of chancery be reversed, with costs to the appellant, in the court of chancery, and in this court.

DECREE REVERSED.

JUNE.

HENDERSON VS. NEGRO TOM.

Where a slave had been imported into this state in 1792 by his owner, who had not complied with the provisions of the act of April 1783, *ch.* 23, by causing a registry, &c. to be made of such slave —*Held*, that the slave was entitled to freedom.

APPEAL from *Harford* County Court. A petition for freedom was filed by the appellee against the appellant. This cause, upon the assent of the parties, being brought before the court, for hearing and trial by the court, the petitioner proved that he was imported from the state of *New-York* into *Harford* county in this state, in the year 1792 or 1793. The defendant then proved to the court, that *Abraham Cole*, a citizen and resident of the state of *New-York*, removed from that state into *Harford county*, in the beginning of the year 1793, and brought with him from *New-York* into *Harford* county, sundry negro slaves, of which the petitioner *Tom* is one; that he continued to reside in *Harford* county from the time of his coming aforesaid, for about 15 years; that the defendant, then and ever since a resident of said county, having intermarried with the daughter of said *Cole*, received from him the petitioner as a part of the portion of his wife, and has so held him ever since; that the petitioner was born in the state of *New-York*, in the family of said *Cole*, to whom the petitioner and his mother belonged as slaves, and has lived with him in *New-York* from the time of his birth; that at the time said *Cole* brought said negro into *Harford* county, there was no naval officer in said county, but a

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naval officer at the city of *Baltimore*; that one *Thomas Taylor* was collector of the tax at the time of the bringing said negro into said county; that in some short time after said negroes were so brought into said county, a conversation did take place about said petitioner, and the other negroes so brought into *Harford* county, the particulars or design of that conversation was not known to the witness; that in March 1793 the petitioner, and other negroes so brought into *Harford* county, were entered on the books of the county assessments of said county, as the slaves of said *Cole*, and taxed to him, and have been so taxed ever since. That the said *Taylor* has long since left *Harford* county, and whether he is still living or dead is uncertain, and if living his residence unknown; and it is unknown where are, or what has become of papers in his possession, if in being. The County Court gave judgment upon the preceding statement that the petitioner was entitled to his freedom, and that he be discharged from servitude, &c. From which judgment the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Kell, for the Appellant, referred to the act of April 1783, *ch.* 23, *s.* 1, and *Scott vs. Negro Ben*, 6 *Cranch* 1.

Winder, for the Appellee.

JUDGMENT AFFIRMED.

HUNT vs. EDWARDS, use of HUNTER.

JUNE.

Where a promissory note was drawn by B, payable to *H*, and by him endorsed to C, who endorsed it to E—*Held*, in an action on it by E against H, that the hand-writing of C should be proved.

Where there was usury in the creation of a promissory note, can a *bona fide* holder maintain an action on it against the payee?

The drawer of a promissory note is a competent witness in an action on it by the holder against the payee, to prove that the note was given on a usurious consideration.

APPEAL from *Baltimore* County Court. *Assumpsit* on a promissory note by the holder against the endorsor. The general issue was pleaded.

1. The plaintiff, (now appellee,) at the trial gave in evidence a promissory note, with endorsements thereon, as follows:

"$412 50. *Baltimore*, 20th October, 1810.

Sixty days after date I promise to pay Mr. *Joshua Hunt*, or order, four hundred and twelve dollars and fifty cents, value received.

Tho. Bailey."

Thus endorsed: "Pay *John Cretin*, or order. *Joshua Hunt.*" "Pay *John Edwards*, or order. *John Cretin.*" And also proved the hand-writing and endorsement of the defendant, (the appellant,) on said note, and that he had regular notice of the nonpayment thereof by the drawer. The defendant then proved, that before the making of the note; that is to say, on the 21st of August 1810, *Bailey*,

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for a valuable consideration, had made his promissory note payable to the defendant, sixty days after date thereof, for the sum of $412 50, and delivered the said note to the defendant; that the defendant having occasion for money, on the 1st of September next following the date thereof, endorsed the said note in blank, and got the same discounted by a certain *Thomas L. Roe*, to whom he paid a usurious consideration for so doing; that *Roe*, being indebted to a certain *John Hunter*, delivered the said note, so endorsed by the defendant, to *Hunter*, as a counter-security for repayment of the money which he owed *Hunter*, and that *Roe* requested *Hunter* to put said note into bank for collection when due. The defendant further gave evidence, that *Hunter* did put the said note into bank for collection, in the name of *John Cretin*, whose name he was authorised to use; that *Bailey*, the drawer thereof, not being able to take it up at maturity, another note was drawn by *Bailey*, and endorsed by the defendant, as a renewal of the former, and delivered to *Hunter* in lieu thereof, who accepted the same, and that the note, on which the present suit is brought, is the note which was given as a renewal of that first mentioned, and was then and now is the property of *Hunter*, for whose use the present action is brought. The plaintiff further gave in evidence, that *Hunter* was the *bona fide* holder of the said two notes, without notice of the usurious transaction between *Roe* and the defendant. The defendant then moved the court to direct the jury, that on the foregoing statement of facts, if believed by the jury, the plaintiff is not entitled to recover in the present action. But the Court, [*Bland*, A. J.] refused to give such direction as prayed, and was of opinion, that on the said facts, as stated, the plaintiff was entitled to recover. The defendant excepted.

2. The defendant then offered to prove by *Bailey*, the drawer of said notes, that he paid to *Hunter*, for discount of said renewed note, (the same on which the present suit is brought,) the sum of 22 dollars, as a consideration for giving further time for payment of said sum of money, as expressed in said note. To which said evidence, so offered to be given by *Bailey*, the plaintiff objected. And the court was of opinion, and so decided, that *Bailey* was an incompetent witness to prove the said facts, which he was offered to prove by the defendant, and rejected his testimony. The defendant excepted; and the verdict and judgment being against him he appealed to this court.

The cause was argued before Chase, Ch. J. and Buchanan, Johnson, Martin, and Dorsey, J.

Hoffman, for the Appellant. The defence set up is usury, not only in the *endorsement* of the first note, but in the creation, or *original concoction* of the second, the one sued on. The case is therefore presented upon two points:

1. If *Hunter* can be considered a *bona fide* holder of the note, unaffected by notice of usury, can he maintain an action against *Hunt*? 2. Is *Thomas Bailey* a competent witness to prove the usurious renewal of the note, and the payment by him of the usurious consideration to *Hunter*?

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On the *first* point he cited *Low vs. Waller*, *Dougl.* 736. *Young vs. White*, *Campb.* 141. *Rich vs. Topping*, *Peake*. 229. *Wilkie vs Rooswelt*, 3 *Johns. Cas.* 66. *Jackson vs Henry*, 10 *Johns. Rep.* 185. *Haley vs. Lane*, 2 *Atk.* 182. *Foltze vs. May*, 1 *Bay's Rep.* 486.

On the *second* point he cited *Jordaine vs. Lashbroke*. 7 *T. R.* 601. *Adams vs. Lingard*. *Peake's Cas.* 117. *Rich vs. Topping*. 1 *Esp. Rep.* 117, (and *note* 1 by *Day.*) *Swift's Evid.* 95.

No counsel argued for the appellee.

Chase, Ch. J. delivered the opinion of the Court. In this case the court are of opinion, that the court below erred by refusing to give the direction stated in the *first* bill of exceptions, there being no evidence to prove the handwriting of *John Cretin*, one of the endorsers. The court do not decide on any other points of law arising on the facts stated in that bill of exceptions.

The court are also of opinion, that the court below erred in refusing to permit *Thomas Bailey* to prove the facts stated in the *second* bill of exceptions, as he had no interest in the event of the suit.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

Benson vs. Hobbs.

June.

In covenant or articles of agreement for the non payment of rent, brought by B against H——*Held*, that the stipulation on the part of B to find for H two bushels of clover seed, and two bushels of timothy seed, for him to sow on the land, and let H have as much rail stuff and fire-wood as necessary for the place; also timber, plank, &c. to build a kitchen, &c. was not a dependent covenant, and B need not, in order to entitle him to recover for the rent in arrear, show that every thing stipulated on his part had been performed

Appeal from *Montgomery* County Court. Covenant on articles of agreement for the rent of a plantation, and the breach assigned was the nonperformance of the covenants, and nonpayment of $160 due for two years rent, &c. The defendant, (now appellee,) pleaded general performance, to which the plaintiff, (the appellant,) replied nonperformance, and issue was joined.

1. At the trial the plaintiff offered in evidence the following articles of agreement, dated the 11th of September 1810, between the plaintiff and defendant, whereby the plaintiff covenanted and agreed with the defendant, &c. that "the said *Benson* hath rented unto the said *Hobbs* all that plantation whereon *N. W. Lanham* occupies, with the improvements," &c. "for the term of four years, beginning for the first year on the 1st day of November next, for the

Parol evidence, that there was a subsequent parol agreement between B and H, that two bushels of clover seed, and two bushels of timothy seed should be bought by H, and deducted out of the rent, not admissible in evidence as a stipulation contained in the articles of agreement, on the part of B to furnish two bushels of clover seed, &c. every year during the continuance of the lease

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yearly rent of $80 per year," &c. "The said *Benson* doth further covenant and agree, to find and give unto the said *Hobbs* two bushels of clover seed, and also two bushels of timothy seed, for him to sow on said land, where the said *Hobbs* thinks best; and also to let the said *Hobbs* have as much rail stuff off said land as the place requires, and as much fire-wood as necessary for the place, during said term. And for the true performance of every of the articles," &c. "the parties bind themselves in the penal sum of $100, to be paid to the party aggrieved," &c. "N. B. The said *Benson* agrees," &c. "to find timbers and plank, nails, and all materials to build a kitchen 16 by 18 feet long; said *Hobbs* is to cut all the timbers, and assist in raising and building said kitchen. Said *Benson* agrees to have it done between this date and the 1st day of January 1811." Signed and sealed by the parties. The defendant then prayed the opinion of the court, that the said instrument of writing was a dependant covenant, and that before the plaintiff could recover for the rent in arrear, he must shew that every thing stipulated on his part had been performed. Which prayer the Court, [*Harwood*, A. J.] granted. The plaintiff excepted.

2. The plaintiff then offered evidence, that subsequent to the execution of the instrument, there was a parol agreement between the plaintiff and defendant, that two bushels of clover seed, and two bushels of timothy seed, should be bought by the defendant, and deducted out of the rent. The plaintiff offered no evidence that this had been deducted out of the rent, nor did the defendant offer any evidence that any part of the rent was paid, although the plaintiff admitted that the first year's rent was settled. The defendant then prayed the court to direct the jury, that this was a stipulation contained in the instrument on the part of the plaintiff to furnish two bushels of clover seed, and two bushels of timothy seed, every year, during the continuance of the lease. Which prayer the court granted. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Chase, Ch. J. and Buchanan, Earle, Johnson, Martin, and Dorsey, J.

Taney, for the Appellant, referred to *Pordage vs. Cole*, 1 *Saund.* 320, *(note* 4.*)*

No counsel argued for the Appellee.

The Court dissented from the opinions of the county court in both the bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

WEBSTER vs. SAUNDERS, Terret. of DULEY.

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Webster vs Saunders

On a *scire facias* by W against S a terre-tenant of D, he pleaded that D was not seized of the land, &c. Evidence was offered of a grant, issued for the land in 1764 to R, and a deed from D to S in 1803. That D cleared a part of the land, and built a dwelling-house thereon and lived therein 24 years; that he declared, when he first took possession that he had rented the land of S O; and it was proved that D paid rent for the land to S O, before it was cleared, for 7 or 8 years—*Held*, that the declarations of D were admissible in evidence; and that W was not entitled to recover.

APPEAL from *Harford* County Court. A writ of *scire facias* issued on the 7th of April 1807, on a judgment recovered in that court in March 1801, by the plaintiff, (now appellant) against *James Duley*. The sheriff returned that he had made known to the defendant (the appellee,) as terretenant of a tract of land called *William's Ridge*. The defendant pleaded that *Duley* was not seized at the time of the rendition of the judgment, or ever after. The plaintiff replied that *Duley* was seized, &c. of the said land, and also of a tract of land called *Coleraine*, of which the defendant is terretenant, &c. Issue joined.

At the trial the plaintiff read in evidence the judgment in the writ of *scire facias* mentioned; also a patent to one *Richardson* in the year 1764, for the tract of land called *Coleraine*. mentioned in the pleadings; and also read in evidence a deed from *Duley* to *Robert Saunders*, the defendant, dated the 16th of June 1803, "for part of a tract of land called *Williams' Ridge*, conveyed to him the said *Duley* by *N. Horner*, containing 100 perches, also ten acres of land being part of a tract called *Coleraine*, which the said *Duley* bought of *Samuel Groome Osborn*," &c. He also proved by witnesses sworn in the cause, that *Duley* cleared the said part of said land, built a dwelling-house thereon, and lived upon the same 24 or 25 years. The defendant then by the same witnesses, offered to prove by the declarations of *Duley*, that he had rented said land of *Samuel Groome Osborn*, in said deed mentioned, when he first took possession of it, before it was cleared. To the giving of which evidence the plaintiff objected. But the Court, [*Bland* A. J.] overruled the objection, and admitted the evidence to be given to the jury. The defendant further proved by the same witnesses, that *Duley* had paid rent for said land to said *Osborn* before it was cleared, for seven or eight years. The defendant then prayed the court to direct the jury, that the plaintiff was not entitled to recover; to which the plaintiff objected. But the court were of opinion that the plaintiff was not entitled to recover, and so directed the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J. by

Kell for the Appellant, and by
Winder for the Appellee.

JUDGMENT AFFIRMED.

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SCHWARTZE, *et al.* vs. TYSON.

Schwartze vs Tyson

APPEAL from *Baltimore* County Court. *Assumpsit* for freight, primage and average. The general issue was pleaded.

A S in April 1809 being the owner of an *American* vessel, entered into a charter party of affreightment with N T, to receive on board of her a cargo of flour in barrels, and proceed from *Baltimore* to *Madeira*, and there deliver the cargo to J P; and if he should so order, proceed, after having changed her papers and flag, to *Liverpool*, and there deliver the cargo to the agent of N T, if permission be given to discharge the cargo there; & if not, then proceed to *Lisbon* or *Cadiz*. J P was authorised to order the vessel to either *Cadiz*, or *Lisbon*, without first going to *Liverpool*. The rates of the freight were stipulated, viz 9s. sterling per barrel on the voyage, ending at *Madeira*, 1 s. 3d. sterling if the vessel proceeded from *Madeira* to *Cadiz* or *Lisbon*, without landing the cargo; 13s 6d. if landed at *Madeira*, and reshipped, and carried to *Lisbon* or *Cadiz*, or to *Liverpool* or if prohibited being discharged at *Liverpool*, and taken either to *Lisbon* or *Cadiz*, or back to *Madeira*, with 5 p. c. primage, &c. The vessel sailed in April, and arrived at *Madeira* in May. The vessel, by order of J P, with the cargo proceeded from *Madeira* to *Liverpool*, without landing any part of the cargo, or changing the flag or papers, and arrived there after the 10th of June, & delivered the cargo to the agent of N T. The proclamation of the President of the *U S* of the 19th of April 1809, declared that the orders in council will have been withdrawn on the 10th of June then next, after which day the trade of the *U S* with *G B*, as suspended by an act of congress may be renewed. On delivery of the flour at *Liverpool*, the agent of N T paid freight at the rate of $2 50 per barrel, which was received by the captain of the vessel without prejudice to the further claim of A S for 50 cents per barrel, so as to make the freight $3 per barrel for the voyage from *Madeira* to *Liverpool*, which the agent refused to pay; and for which A S brought an action of *assumpsit* against N T—*Held*, that if the voyage from *Madeira* to *Liverpool* was undertaken in consequence of a new contract between J P as agent of N T, and the captain of the vessel, then the action might be supported: but that no evidence of such new contract had been proved, for which reason A S could not recover

At the trial the plaintiffs, (now appellants,) gave in evidence, that on the 4th of April 1809, they being owners of the ship *James*, an *American* vessel belonging to *Baltimore*, let her to freight to the defendant, (the appellee,) and a certain *William Greetham* and *John Devereaux*, trading under the firm of *Greetham* and *Devereaux*, and a certain *Thomas Lee*, by a charter party of freightment under seal, and duly executed, dated the 3d of April 1809, whereby the master of the vessel was to receive on board of her a cargo of flour and cotton, and proceed to the Island of *Madeira*, and on his arrival there deliver the cargo unto *Isaac Philips*, or his order, agreeably to the bill of lading; that the said ship should, if *Philips* should so order and direct, proceed, after having changed her papers and flag, to *Liverpool*, and there make a right and true delivery of the cargo to the agents, factors or consignees, of the freighters, provided that said ship be permitted to discharge the cargo at *Liverpool*. but if she should be prevented, the master with the ship should proceed from *Liverpool* either to *Lisbon*, *Cadiz*, or back to *Madeira*, as the agents, &c. should order—provided that *Philips* should be at full liberty, on her arrival at *Madeira*, to order the ship either to the port of *Cadiz* or *Lisbon*, without first proceeding to *Liverpool*. In consideration the freighters promised to lade on board the ship a full cargo of flour and cotton, and pay to the owners as and for the freight or hire of the vessel, at and after the rate of nine shillings sterling for each and every barrel of flour so to be laden on board the said ship, if the said voyage ends at *Madeira*; eleven shillings and three pence sterling per barrel, if the vessel proceeds from *Madeira* to *Cadiz* or *Lisbon*, without landing her cargo at *Madeira*, and thirteen shillings and six pence sterling per barrel if she lands her cargo at *Madeira*, reship the same, and proceeds to *Lisbon* or *Cadiz* therewith, or to *Liverpool*, or if prohibited discharging at *Liverpool*, shall proceed either to *Lisbon*, *Cadiz*, or back to *Madeira*, with 5 p. c. primage, &c. which said several sums shall be deemed and taken in full of freight, primage, port charges, and all other charges whatsoever, save and except the charges of landing said cargo at *Madeira*, and reshipping the same for *England*. They further gave in evidence, that the defendant, immediately after the date of the charter party, and in pursuance thereof, put on board of the

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ship *James* at *Baltimore*, 2200 barrels of flour, his property, to be transported to *Madeira*, and some other port or ports, pursuant to the stipulations in the charter party contained; and that the said ship, with these 2200 barrels of flour on board, together with other flour belonging to the other charterers, sailed under the said charter party from *Baltimore* sometime in the month of April aforesaid, on the voyage to *Madeira*, where she arrived sometime in the month of May following, and found there the said *Isaac Philips*, in the charter party mentioned, who was the agent of the defendant, and the other charterers. They further gave in evidence a proclamation of the President of the *United States*, bearing date the 19th day of April 1809, declaring and proclaiming that the orders in council will have been withdrawn on the 10th of June then next, after which day the trade of the *U. S.* with *G. B.* as suspended by the act of congress, &c. may be renewed. They also gave in evidence, that the said ship, on or about the 25th of May 1809, with the said flour of the defendant on board, proceeded from the Island of *Madeira*, by order of *Philips*, and with the consent of the master of the vessel, to *Liverpool*, without either landing any part of the cargo, or changing the flag or papers of the ship, and arrived there a few days after the 10th day of June in the said year, and delivered the defendant's said flour to his agent there, who received it for him and on his account, and paid freight at the rate of two and a half dollars for each barrel, which the captain of the said vessel received without prejudice to the further claim of the plaintiffs for one half of a dollar on each barrel, so as to make up the freight of three dollars per barrel for the voyage from *Madeira* to *Liverpool*, which the said agent refused to pay, and for which this action is brought. They further gave in evidence, that *Philips* sailed from *Baltimore* to *Madeira* sometime before the date of the said charter party, and before it was made, and that before he sailed he was constituted the agent of the defendant, and the other charterers of the ship, for the purpose of receiving, directing and disposing, for them, of such cargoes and property as they might send to *Madeira* in the said ship, or others; and that before he so sailed he, for and by the directions of the defendant, and other charterers, made a contract with the plaintiffs for the said ship, and received particular verbal instructions from said charterers and the defendant to send on said ship to *Liverpool* from *Madeira*, in case the laws of the *United States* should be so altered as to render such a voyage lawful, and in no other case; and that the contract which he made as aforesaid, verbally, for the said ship, was entirely conformable to these orders, which were never in any manner altered by them, or intended to be departed from by him. They also gave in evidence, that at the time of the said voyage from *Madeira* one dollar per barrel on flour was a reasonable freight on such a voyage. It was admitted that the clause in the charter party,

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which provides for a change of papers in certain events that might happen in the prosecution of the voyage, was understood to mean a colourable transfer and change of the property to some foreign subject, on whom the laws of the *United States* could not operate. The defendant then prayed the opinion of the court, and their direction to the jury, that upon this proof the plaintiffs were not entitled to recover. And the Court, [*Nicholson*, Ch. J. and *Bland* A. J.] were of opinion, and so directed the jury, that if the voyage from *Madeira* to *Liverpool* was undertaken in consequence of a new contract between the said *Isaac Philips*, as agent of the defendant, and the captain of the said ship, the action might be supported, but that no evidence of such new contract had been offered, for which reason the plaintiffs could not recover. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Harper, for the Appellants. 1. The direction of the court assumes an erroneous principle of law. It rests wholly on the idea that the voyage provided for by the charter party, and proved by the evidence stated in the bill of exceptions, was illegal and cannot be enforced. But this is a mistake. The voyage was not intended to evade the non intercourse or embargo laws, and was not forbidden by them. The goods were not to be placed in *Madeira* with a view of being introduced into *England* contrary to law, but with a view of being sent to *England* when the law should be repealed or suspended. It was lawful to send them thither with this view. And it was lawful to send them from thence to *England*, as soon as the proclamation, suspending the law, appeared, provided care was taken that they did not arrive before the 10th of June 1809, when the suspension was to take effect. In all this there was nothing illegal. Consequently the court erred in assuming, as the basis of their direction, an erroneous principle of law.

2. Their opinion also contains an erroneous statement of fact. It alleges that there was no evidence of any new contract between *Philips* and the captain, to proceed with the flour from *Madeira* to *Liverpool*, without unlading at the former place. Now it is evident that there was no stipulation in the charter party for such a voyage. There were three voyages from *Madeira* provided for by the charter party, but they all differed from this. It is also evident, from the bill of exceptions, that *Philips* was fully authorised to make this new contract with the captain; and it is positively stated that the captain did go on this new voyage at the request of *Philips*. What is this but a contract? There cannot, it is apprehended, be one more express.

No counsel argued for the Appellee.

JUDGMENT AFFIRMED.

BOYLE, *et al.* vs. M'LAUGHLIN. 1817. JUNE

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Action against H and B as common carriers of goods, &c. transported partly by land and partly by water, in packets and waggons, from *Baltimore* to *Philadelphia*, by the way of *Elkton* and *Christiana*, brought for negligence, &c. in the transportation of flour, &c. Much evidence was given of the badness of the roads, and destruction caused to the flour at *Christiana*, (where it was delivered, to be taken therefrom in packets,) by a considerable fresh occasioned by a heavy fall of rain which overflowed the place where it was deposited. On various questions submitted upon the evidence, the court directed the jury, 1 That if the delay in the land transportation was altogether owing to the flounderous condition of the public roads, H and B were excusable; but if it was to be attributed to their taking more merchandize than they had the power or means to carry in the usual course of transportation, then they were inexcusable, and chargeable for the delay which had been so occasioned. 2. That the testimony offered by H and B. in relation to the fresh that happened at *Christiana*, was not to be regarded at all, because it did not legally excuse them from answering for any damage the flour had sustained by reason of the fresh. 3. That the testimony by them offered in relation to the damage which the flour sustained on board the schooner F, did not legally excuse them from answering for the damage thus sustained on board the schooner, and ought therefore to be wholly disregarded. 4. That if 97 barrels of the flour, shipped on board the sloop L. was sent to *Lamberton*, beyond its original destination, without the orders or authority of the plaintiff or his agent, H and B were liable; but not otherwise. 5. That if the delay in the whole line of transportation was occasioned by the acts of God, such as adverse winds, the flounderous situation of the roads unusually low tides or the like, H and B were excusable. But if the delay was occasioned, or in so far as it was occasioned, by H and B taking a greater quantity of commodities than they had the means of transporting, or by the unskilful navigation of the vessels, or any other circumstances which could not be deemed the immediate and distinct act of God, or the enemies of the state, then H and B were chargeable for such delay. 6 That if the agent of H and B did call for instructions at *Philadelphia*, on the agents of the plaintiff, relative to the sending the 97 barrels of flour to *Lamberton*, and received none, then H and B were justified in carrying the flour to *Lamberton*. 7 That the plaintiff was nevertheless entitled to recover, because such new engagement to carry the flour to *Lamberton* was no alteration or modification of the contract declared on, but an excuse for the nondelivery of the flour at *Philadelphia*, which it was proper should come from H and B. and was not necessary to be set out in the plaintiffs declaration.

Certain declarations of H., made to persons applying to have goods transported, &c. of the press of business upon the concern, by reason of the great quantity of commodities which necessarily passed along the line, and the difficulty at that season of the year of transporting the same with usual expedition, and that all persons who sent commodities by the said line must stand the risk of delay on those accounts, but that the concern would do all in their power to transport the commodities without delay and with safety. There was no evidence that any such declaration was made to the plaintiff, (who was present when the application was made for the transportation of his flour,) or that he had any knowledge thereof—*Held*, that the evidence was inadmissible.

APPEAL from *Baltimore* County Court. This was an action on the case brought against the defendants, (now appellants,) as common carriers, for negligence in the transportation of flour, &c. The general issue was pleaded.

1. At the trial the plaintiff, (now appellee,) gave in evidence, that in the spring of the year 1818 the defendants formed a copartnership for the transportation of merchandize, as common carriers, from *Philadelphia* to *Baltimore*, and from the latter to the former, in packets and waggons, by the way of *Elkton* and *Christiana*, and caused notice to be given thereof by the following advertisement in the newspapers of *Baltimore*:

"New Mercantile Line of *Philadelphia* Packets.

The subscribers respectfully inform the public that they intend running a line of packets to and from *Philadelphia via Elkton* and *Christiana*, for the transportation of goods, which will commence on Tuesday next. Persons sending goods by this line will be certain of a speedy and safe conveyance, as they have excellent warehouses at *Elkton* and *Christiana*, and good waggons engaged. As the proprietors of this line are about making arrangements with one of the *New York* lines, and may probably extend the connexion as far as *Boston*, they are induced to believe that the public will be materially benefited by its establishment, and respectfully solicit a share of their favours. A packet will leave the head of *Smith's* Dock every Monday, Wednesday and Friday."

He further gave in evidence, that he on the 21st day of October 1818, at the port of *Baltimore*, shipped on board one of the defendants' packets, then called *The Mercantile Line of Packets*, 500 barrels of good, sound, merchantable, superfine flour, to be carried and transported by the route in said advertisement mentioned, to *Philadelphia*,

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there to be delivered to *Benjamin Stephens*, his agent and consignee, he paying freight therefor. And at the time of shipping the same obtained from *Hugh Boyle*, one of the defendants, the following receipt or bill of lading: "Received, *Baltimore*, 21st of October 1813, of Captain *M'Laughlin*, on board *The Mercantile Line of Packets*, 500 barrels of flour marked M, which *we* promise to have delivered to Mr. *Benjn. Stephens* in *Philadelphia*, *(the dangers of the seas, capture, fire, leakage, breakage excepted,)* he paying freight for the same 80 cents per barrel

Hugh Boyle."

He further proved, that the flour was carried from *Baltimore* to *Elkton* in said packet, and was there landed on the 22d of October in the same year, and arrived at *Christiana*, (distant from *Elkton* 10 miles,) part on the 13th and part on the 15th of November following, where it remained till the first of December following. That during the time it so remained at *Christiana*, a small portion was in the company's warehouse, and the residue was piled up on the shore of *Christiana* Creek uncovered and exposed to the weather; that whilst it so remained on the shore a considerable rain fell, and occasioned an overflowing of the creek, by which means the flour got wet and much damaged. That on or about the first of December, 388 barrels of the plaintiff's flour were put on board the schooner *Friendship*, (hired in *Philadelphia* for the purpose, and not one of the regular packets.) by the defendants at *Christiana*, to be carried to *Philadelphia*. That said schooner, soon after leaving *Christiana*, grounded and half filled with water, owing to the unseaworthiness of the vessel, or the want of skill, or negligence of the captain, or to the vessel being overloaded, which grounding and sinking occasioned a further damage to the flour. He further proved that the said schooner *Friendship* arrived without further accident at *Philadelphia* on or about the 11th day of December aforesaid, and on or about the 15th of the same month, landed of the plaintiff's flour only 343 barrels which was delivered to *Benjamin Stephens*, the plaintiff's agent, by *Latimer* and *Murdock*, the defendants' agents, and was specially accepted by said *Stephens* under the reservations and conditions expressed in the following receipt, written by *Stephens*, dated *Philadelphia*, December 11, 1813, and addressed to *Latimer* and *Murdock*, viz. "The schooner *Friendship* having arrived here with some flour for me, being part of 500 barrels shipped to my address the 21st of October last, I will receive the same subject to my claim for damage for the short delivery, for the detention, and for the injury done to the flour." The flour so delivered was regularly surveyed and inspected before its removal from the wharf where it was landed, and was found to be much injured and damaged by the circumstances herein before detailed, in its transportation from *Baltimore* to *Philadelphia*—and *Stephens*, the consignee sent the same to auction, where it was sold for very reduced prices in consequence of the said inju-

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ry and damage; the residue of the flour by the *Friendship*, that is to say, 45 barrels, were never delivered but wholly lost to the plaintiff. He further gave evidence that 97 barrels of said flour shipped by him as aforesaid, were shipped by the defendants at *Christiana*, on board the schooner *Lettice*, (not a regular packet but hired for the occasion) on or about the 1st of December, which never was delivered at *Philadelphia* or any other place authorised by the plaintiff or his agent, but was wholly lost to the plaintiff. That the defendants shipped five barrels of said flour on board the *Kitty* and *Sally* at *Christiana*, which were never delivered to the plaintiff or his agent, but were wholly lost; and that ten barrels, the residue of the 500, were never forwarded or delivered to the plaintiff or his agent agreeably to the bill of lading, but were wholly lost. That at the time of the arrival of the plaintiff's flour at *Elkton* as aforesaid, flour and other merchandize had previously so much accumulated at that place by the undertaking of the defendants to transport and carry the same forward from *Baltimore* to *Philadelphia* by the same route, that the defendants were unable to transport the same in due and reasonable time, by means of the waggons and vessels which they had and kept employed for that purpose, from thence to *Christiana* and *Philadelphia*, and from that cause a delay of from 30 to 40 days occurred in the transportation of said flour. That at the time of the formation of the said co partnership for the transportation of goods and merchandize as common carriers, in March 1813, the coasting trade of the *United States* was nearly or entirely cut off, and as completely intercepted as it was at the time of the shipment of the said flour, and that the same difficulties and obstacles which existed to the transportation at the time of the shipping of the said flour also existed at the time of the establishment of the line, and none other. That while said flour was piled up as aforesaid, a heavy rain fell and created a great and unusual fresh at that season of the year, and that the said flour, so piled up on the shore of said creek, was by the falling of said rain and the overflowing of the creek greatly injured and damaged. That a sufficient number of waggons and packets or vessels for the transportation of the goods and flour aforesaid, might have been obtained and employed by the defendants during the period aforesaid, had they made exertions for that purpose. That the captain of the *Lettice* did not call at *Philadelphia* or apply to *Latimer* and *Murdock* for instructions relative to the destination of the flour of the plaintiff, but without further or other instructions than those given to him by *Nevin & Allen*, proceeded and delivered the flour to some person or persons in *Lamberton*, which said delivery was to a person not authorised to receive the same by the plaintiff, and of which delivery the plaintiff or his consignee had no notice, and such flour was never accepted or received by the plaintiff or his agents, and that the flour shipped on board the *Kitty* and *Sally*, or that transhipped on board the *Sampson*, has not

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since been heard of by the plaintiff, and is wholly lost to him. That before the establishment of the said line in March as aforesaid, there had been no regular transportation by this route between *Philadelphia* and *Baltimore*. That there were other places at *Christiana* more elevated, where the flour might have been piled on the ground, where it would have been in no danger of having been overflowed by the said fresh, and which places were convenient for shipping said flour. That the quantity of goods ordinarily transported by this route before the establishment of said line of packets and waggons by the defendants, was very inconsiderable to what it was afterwards. That the usual time employed in transporting goods by this route from *Baltimore* to *Philadelphia* was from 5 to 15 days. That at the time of the arrival of the flour at *Elkton* the roads between that place and *Christiana* were in tolerable good order, and that if proper exertions had been made by the defendants the same might have been transported to *Christiana* in 4 or 5 days, instead of 21 or 23 days which elapsed before the same was transported by the defendants from *Elkton* to *Christiana* as aforesaid. He further gave evidence that *Stephens*, the consignee, after writing said letter of the 25th of November 1813, went to *Christiana*, and there personally directed *Nevin* and *Allen*, two of the defendants, to send said flour to *Philadelphia* agreeably to the original bill of lading, where he *Stephens* would himself arrange and prepare the means of its further transportation should he determine to send the flour on to *New-York*. The defendants then gave in evidence, that the 500 barrels of flour mentioned in the plaintiff's declaration, arrived in due season, in good order and well conditioned, at *Elk Landing* on the *Chesapeake* bay, and was there unloaded for the purpose of being transported by land carriage across to *Christiana*, at the head of a small creek which empties into the *Delaware* bay, that being the ordinary route used by the defendants in the conveyance of goods from *Baltimore* to *Philadelphia*. That at the time when the said flour was shipped at *Baltimore*, it was a fact of general notoriety that the whole coasting trade of the *United States* was almost entirely destroyed and put an end to by the ships of war of the enemy, and that the transportation of goods and merchandize from one part of the *United States* to another was altogether inland; that in consequence of this great intercourse, thus carried on, there was a large accumulation of property at *Elk Landing*, and for the removal of which across the isthmus between the *Chesapeake* and *Delaware* bays, the defendants employed more than 130 waggons, being all that they could procure for that purpose within the distance of 30 or 35 miles. That the usual number of waggons employed by them for the conveyance of goods in ordinary times did not exceed from 12 to 20. That it was a fact generally known that the roads between *Elk Landing* and

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Christiana were much cut up and destroyed by reason of the many heavy loaded waggons daily passing over them at that time, insomuch that the travelling was thereby greatly retarded, as it often happened that a waggon with five horses could not carry more than eight barrels of flour, when the usual load in a different state of the roads was 20 barrels. That the flour of the plaintiff was sent from *Elk Landing* to *Christiana*, as soon as it was practicable under the existing and known state of things, and that there was no unnecessary delay, nor any default on the part of the defendants, or their agents or servants, and that the same was delivered at *Christiana* on the 13th and 15th of November in the year aforesaid, for the purpose of being put on board of boats or vessels to be carried to its place of destination. That for some time previous to the arrival of said flour at *Christiana*, there had prevailed strong westerly and nor hwesterly winds, which caused the tides in the creek of *Christiana* to be so low that it was found impracticable for the vessels employed by the defendants to get up to the wharves to load; that owing to the prevalence of these winds, and lowness of the tides, by which even light vessels were prevented from reaching the wharves to receive their cargoes, there was a great and unexpected accumulation of flour and other property at *Christiana*, insomuch that all the warehouses of the defendants at that place were filled with commodities passing in a regular course of transportation by their said line, and it was found necessary to pile it away in a state of safety on the wharves adjacent to the place of shipment. That a part of the plaintiff's flour, to wit, about 200 barrels, were thus, with other flour belonging to other persons, piled away on a rising ground beyond the reach of ordinary and probable tides and freshes or inundations of the creek. That no other warehouses could be obtained in the said place as they were all occupied and full. That the said warehouses were substantial and good, and that in the ordinary and usual state of transportation, the warehouses of the defendants were greatly more than sufficient for the storeage of goods conveyed by them, and that every precaution was taken by them to preserve the said flour from injury by its exposure, such as having planks and tarpoulins in readiness, and prepared to cover the same. That while the 200 barrels of the plaintiff's flour were thus situated, the residue being in the warehouses, a sudden, unusual and extraordinary fresh or overflowing, took place in *Christiana* creek, such as had not occurred for 20 years and upwards previous to that time, by which a part of the said flour, to wit, from 20 to 50 barrels were wetted and damaged, and a part, to wit, 10 barrels, were carried away by the force of the flood and entirely lost, it not being in the power of the defendants to prevent the same. That every means was afterwards used by the defendants to prevent and repair all the injury to the said flour by being wet as aforesaid, and that the said flour received no da-

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mage whatever from rain or weather, or from any other cause than that which is here stated. That the whole of the flour of the plaintiff, except 10 barrels which had been swept away by the force of the current, were shipped on board of vessels on the 1st of December in the year aforesaid, that being the earliest period of time at which the vessels could reach the wharves for the purpose of being loaded, where only they could be loaded. That after the inundation aforesaid, and previous to the loading of the flour on board of vessels at *Christiana*, *Benjamin Stephens*, the consignee of said flour, came from *Philadelphia* to *Christiana*, and after an examination of the flour gave the following directions to the defendants: "To be delivered at *Lamberton* or *Bordenton* as *Latimer* and *Murdock* may direct," having previously written the following letter addressed to *Nevin* and *Allen*, the agents of the defendants at *Christiana*, dated *Philadelphia*, November 25, 1813. "Your favour of yesterday is just received. It is my intention to forward the flour (or most of it) to *New-York*, but as yet I have not made a contract with any of the lines. You will please direct the captain who brings it to call on the agents here, with whom orders will be left where to send it, so that there will be no detention. It will be either to *Lamberton* or *Bordenton*. I hope you will send it on without loss of time, as every day is of much importance in the present critical state of affairs." That 388 barrels, part of the said flour, were shipped and stowed in the usual and proper manner on board a good and sufficient vessel called the schooner *Friendship*, captain *Gillan*, to whom the following instruction was given, and who gave the following receipt, viz. To be delivered at *Lamberton* or *Bordenton*, as *Latimer* and *Murdock* may direct, &c. That the vessel called the *Friendship* proceeded without delay upon her said voyage, but on account of the continued lowness of the tides in *Christiana* creek, grounded at a short distance from the wharf at which she had been loaded. That she was got afloat again, and then proceeded some distance further down the creek on her said voyage, when for the same reason, and without any default on the part of the master and mariners, or others, she again grounded, by reason whereof, in the course of the night of the 6th of December, some of the planks of her bottom were strained, by which she leaked, and in consequence thereof filled with the water of the creek, without its being possible to prevent the same. That this unavoidable accident rendered it necessary that a part of the said flour, to wit, 110 whole and 9 half barrels should be immediately taken from on board the *Friendship*, and put on board the sloop *Sampson*, a good and sufficient vessel, which at that time happened to be lying aground, although light, alongside of the *Friendship*. That there was no other mode of disposing of the said part, and that it was accordingly immediately put on board the *Sampson*, with instructions to carry the same to

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the only place to which the master would consent to carry it, viz. to *Lamberton* upon the *Delaware*, distant from *Philadelphia* about 30 miles. That all possible means were promptly used to discharge the water from the *Friendship* to get her off the bar on which she was lying, and to put her in a condition to resume her voyage with the residue of the flour. The water was accordingly discharged from her; that she was got off from the bar, and that after all proper measures were taken for preventing, as far as might be, any injurious effects to the flour which the water had reached, the schooner resumed her voyage aforesaid, with the said residue of the flour on board, and without delay or further accident arrived at *Philadelphia* on the 11th of December in the said year. That the said flour, viz. 343 barrels, on its being landed at *Philadelphia*, was afterwards sold by the consignee thereof at public auction, and produced the sum of $1;574 and 14 cents, according to the account of sales thereof. That the flour taken from on board the *Friendship*, and removed to the *Sampson*, was without delay transported and carried to *Lamberton*, and there delivered and safely landed, of which the said *Stephens* had due and proper notice. That the 97 barrels of flour, so as aforesaid shipped on board the sloop *Lettice*, were carried and taken to *Philadelphia*; and that the captain, after making inquiry to ascertain whether instructions had been left with *Latimer* and *Murdock* for the purpose of directing him to proceed with the said flour to *Lamberton*, or *Bordenton*, and finding that none such had been given, he prosecuted his voyage to *Lamberton*, and there delivered the said flour to ——— *Howell*, in whose warehouse the same was stored, and took a receipt therefor, which he afterwards delivered to *Latimer* and *Murdock*, and who communicated the same to the said consignee. That the 5 barrels so as aforesaid shipped on board the schooner *Kitty* and *Sally*, were delivered at *Lamberton*, of which the consignee was notified in due time; and that the remaining 10 barrels were entirely lost and swept away by the fresh and inundation that happened at *Christiana*, while the same was stored as aforesaid on the wharf at *Christiana*. They further gave in evidence, that no freight was ever paid to the defendants for any part of the flour thus transported as aforesaid. The defendants then prayed the court to direct the jury, that if the jury believe the evidence so as aforesaid offered by the defendants, the plaintiff is not in point of law entitled to their verdict for or on account of any part of the flour in his declaration mentioned.

The County Court, [*Bland*, A. J.] delivered the following opinion. This action is brought against the defendants as common carriers, to recover the value of 500 barrels of flour, which the plaintiff alleges they received and undertook to carry to *Philadelphia*. The plaintiff founds his right to recover on the following grounds, 1. That a part of the flour was materially damaged. 2. That another part

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was swept away by a fresh, and so wholly lost. 3. That a third parcel was sent to *Lamberton* beyond its place of destination, without any orders or authority from the plaintiff, or his agent, and thus also wholly lost; and 4. That there was an unreasonable and injurious delay in transporting the flour from *Baltimore* to the place of its destination.

The plaintiff has urged that the testimony of the defendants, if believed by the jury, does not amount in law to such an excuse, arising wholly from the act of God, or the enemies of the Republic, as will bar him from claiming compensation for the injury he has thus sustained. The defendants have offered in evidence a great variety of circumstances which they have insisted shew conclusively that all the delay, damage and loss, which has been sustained, was entirely owing to causes for which they are not responsible.

In carrying our attention along the route which this flour was to travel, we find that the cause of complaint commences with the land transportation; there it is alleged the commodity was unreasonably retarded in its progress, or that it was not accelerated with that rapidity and despatch that it ought to have been. In reply it is said, that the road over which it was to pass was at that time so excessively bad, and so very founderous, that it was utterly impossible to get along any faster with that number of waggons and force of teams, which was commensurate to all the ordinary calls of that species of transportation.

It is said in the books, that when a highway becomes so out of repair, that travellers cannot pass along it, they will be justified in leaving it, and going upon the adjoining fields. There are many respectable authorities which lay down the law in this manner, and none of them make any distinction *as to the causes* which may have produced the founderous condition of the road, but whatever may have occasioned *such* impracticability, the traveller shall not in such case be deemed a trespasser by going upon the adjoining fields. Founderous roads seem to be thus considered in some degree as the act of God, and therefore as forming an excuse for a traveller who from *that cause* trespasses upon a neighbouring field. And upon the same principles, *such kind* of bad roads will in my opinion be an excuse for any delay occasioned thereby to a carrier, who is under a necessity of passing over them. I would here, however, observe, that my determination is founded upon the road's being in that condition properly called *founderous;* and that I wish to exclude from the grounds of my opinion those cases where the delay has been occasioned by obstructions or nuisances, such as felled trees, ditches, fences, and the like, made by *individuals* who may be prosecuted for such acts, as well by the public as by the person who has sustained any special damage, because *such cases* appear to me to give rise to a different train of reasoning, and therefore cannot be considered as falling altogether within the same principles of law applicable to the

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case of a founderous highway. The impracticability of a road occasioned by the great and unusual number of passengers, is a kind of obstruction produced by the public for which the person injured has no remedy; it is, as to the individual so retarded, the immediate *act of the nation*, or *as it were* the act of God But where the carrier may recover damages for his delay, it would seem to be unreasonable that he should not answer over to the person who has suffered by such detention. I therefore think that the premises taken in the argument of this case from the case of *Amies vs Stevens*, 1 *Strange* 128, that where damage is occasioned by the act of God, *operating upon*, or *as secondary* to the act of *man*, which was the immediate causes of injury, is by much too large. But it would perhaps be correct to say, that in all cases where the *immediate* cause of injury or delay is a *public* or *national* act, as the erection of a bridge over a navigable river, or the like, *coupled* with an act of God or *physical impossibility*, as a *secondary* or *remote* cause, the carrier shall be excused. The roads are usually better in summer than in winter, and consequently the transportation of commodities will move more rapidly at one season than at another. And I deem it sufficient for the defendants if they show that their force of teams and waggons was adequate to the ordinary purposes of transportation in the common state of the roads; for a carrier is not bound to find a new carriage for every journey, or to provide new and additional force of teams for every change in the state of the highway. In this case, therefore, so far as the delay was occasioned solely and exclusively by the *founderous* condition of the roads, the defendants are not chargeable for such delay.

But on the other hand, if the delay in this stage of the progress of the flour was not occasioned solely and exclusively by the bad road, but in part by the defendants having received and undertaken to carry more commodities than they had the means of carrying, then they are chargeable; for if, by limiting themselves to a certain quantity of merchandise, they could have carried it in the usual and ordinary time, they were bound to do so. The law authorises them to refuse to take more than they have the means or the power of transporting; but if they do overburden themselves, and in consequence thereof any delay or loss occurs, they are liable I shall, therefore, as to this part of the case, give this direction to the jury—That if they shall believe that the delay in the land transportation was altogether owing to the *founderous* condition of the road, the defendants are excusable; but if they shall believe it was to be attributed to the defendants taking more merchandise than they had the power or the means to carry in the usual course of transportation, then they are inexcusable, and chargeable for the delay which has been so occasioned.

The next stage at which we are called on to attend to the situation of this flour, and to notice the conduct of

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these carriers, is at *Christiana*. This is by much the most important resting place of this eventful journey, and where we shall have less difficulty in apprehending and explaining the extent of the responsibility, and the principles on which it rests, than in moving over the ten miles of founderous highway. The defendants having established a line of communication between *Baltimore* and *Philadelphia*, by packets and waggons, advertised to all the world that they were prepared and willing to undertake the transportation of merchandise in *safety*, by packets sailing from *Baltimore* to *Elkton*, where they had good and sufficient warehouses whence their waggons will convey it to *Christiana*, where also they have ample warehouses in which it may be *safely* stored until it is put on board of packets, and transported by water in *safety* to *Philadelphia*. In addition to this advertisement it further appears, that such was the usual and constant mode of transportation along this route, on which, and with reference to which, the contract in this case was made. But in this case the greater part of the flour, on its arrival at *Christiana*, was put upon an elevated place on the wharf, wholly uncovered, and in every respect unprotected from the weather. And while it lay there, a fresh arose in *Christiana* creek, by which a great part of that, which was so exposed, was damaged, and some of it swept quite off. The fresh, say the defendants, occasioned this damage and loss, and the fresh was surely the act of God. But how came the flour to be thus carelessly disposed of and exposed to damage and perils from every quarter and of every sort? And why was it not stored? It was impossible, it is said, to procure any kind of warehouse room for this flour, because, owing to the very great and unusual press to have commodities transported along this line, in consequence of the coasting trade being cut off by the public enemy, every warehouse that could be had was stored full. But these carriers knew the state of public affairs; indeed this line of communication was established, it is said, in consequence of the state of the country, and became unusually crowded and profitable, chiefly from the same cause. These defendants knew, and were bound to know, the extent and capacity of their means of transportation; and the sufficient capacity of their warehouses at *Elkton* and *Christiana* was a most essential and important portion of their means of transportation in *safety*, which they knew, undertook for, and consequently insured. They were not bound to take more than their warehouses could contain, any more than to receive on board their packets so much as might sink them; and having the right, it was their duty to refuse to receive and transport, under the *general pledge and responsibility* of carriers, any more commodities than they had the means of conveying *in safety*. But who gathered together, and persevered in gathering together, those enormous bulks of commodities at *Elkton* and *Christiana*? Who profited by it? Who

induced the public and this plaintiff to believe that the goods they received to carry would be placed in warehouses? *Why the defendants.* The defendants, therefore, are chargeable for the damage and loss that has been thus sustained. The defendants cannot avail themselves of any thing like a half way excuse or apology—the loss must have been occasioned altogether by the act of God, and *as such* amounts to a complete and absolute *excuse*, or it is none at all. But here the defendants were in fault in so accumulating commodities on their own hands that they could not store this flour, and are therefore chargeable, and consequently cannot be allowed to give in evidence the *manner* in which the loss was occasioned, in *mitigation* of damages. Upon this subject, therefore, I shall direct the jury, that the testimony, so far as it relates to this part of the case, is not to be regarded at all, because, if true, it does not amount to a legal excuse.

After the fresh in *Christiana* Creek was over, so much of the flour as was left, and in such condition as it was left, was again put in motion toward its place of destination—and the misfortunes which attended that part of this residue which was put on board the schooner *Friendship*, forms the next distinct branch of this case to which our attention has been particularly directed. It is alleged, that at the time this vessel commenced her voyage, the tide in *Christiana* Creek was unusually low, owing to the prevalence of the westerly and north westerly winds; that after she had gone a short distance she grounded, but was got off in safety, and then proceeded some distance further down the creek, when she again grounded, whereby some of the planks in her bottom were strained, so that she leaked and filled with water, in consequence of which a part of the flour was transhipped on board the sloop *Sampon* bound to *Lamberton*, where it was taken; and that after some time the schooner *Friendship* was again got afloat, and proceeded to *Philadelphia*, where she delivered that which remained on board of her, to the consignee, in a damaged condition. For all which the defendants say they are not answerable, because the low tide was the act of God, and *that act* produced the damage and loss. In the case of *Amies vs. Stevens*, where in coming through a bridge, by a *sudden gust* of wind the *Hoy* was sunk, and the goods were spoiled, the carrier was held not to be answerable, "for, said *Pratt*, Ch. J. though the defendant *ought not* to have ventured to shoot the bridge, if the general bent of the weather had been tempestuous, yet this being only a *sudden gust* of wind had entirely varied the case." The sound sense of what is here said seems to me to amount to this, that where the *general bent* of the weather is tempestuous, the carrier is not only excusable, but he is commendable in *delaying* the further prosecution of his voyage until the stormy state of things shall pass away or subside; but that, if when the general bent of the weather is tempestuous, he does notwithstanding persist in prosecuting his voyage, as if in such

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a state of things he had undertaken to shoot the bridge, and his vessel is sunk, he is answerable. The carrier is not bound to encounter any unusual or extraordinary perils occasioned by the act of God, but if he does so, he proceeds at his own risk. And again, a carrier takes upon himself the knowledge and the hazard of all the difficulties and perils of the route in which he proposes to go, except those proceeding *immediately and solely* from the act of God, or the enemies of the country; as where there was an anchor thrown into the river against which the vessel of the carrier was driven and sunk, he was held to be answerable, for it was his negligence in not inquiring more minutely about this new danger in that navigation, which he undertook to know. For as to all these and such circumstances, the carrier is, to all intents and purposes, an *insurer*. He contracts that the goods shall be carried *in safety*, and nothing will excuse his failing in the exact and punctual fulfilment of this contract, but his being prevented by the act of God, or the enemies of the country. The application of these principles, thus illustrated, to the predicament of the schooner *Friendship*, will, it appears to me, leave little or no doubt about the extent of the liability of these carriers. If the prevalence of the westerly and north-west winds had occasioned an uncommonly low tide in *Christiana* Creek, and thus, in an *extraordinary manner*, increased the perils of that navigation, these carriers were not bound at their *own risk* to encounter these *new* and *extraordinary* dangers; they would have been excusable in making a reasonable delay until these *additional and temporary* perils had passed away. But inasmuch as they did proceed, they prosecuted the voyage at their *own risk*; they knew, or they took upon themselves the knowledge of the changes in the navigation which had been thus occasioned, and they voluntarily proceeded; consequently they moved forward at their own risk. I shall therefore direct the jury, that the evidence offered as to this part of the case, if true, does not legally excuse the defendants from answering for the damage which the flour sustained on board the schooner *Friendship*, and is therefore to be wholly disregarded.

The attention of the court has been called to another parcel of this flour, which was put on board the sloop *Sumpson*, and another vessel, and sent to *Lamberton*, as is alleged, without any orders or authority from the plaintiff or his agents. As to which, if the jury shall believe, from the evidence, that this parcel of flour was sent to *Lamberton* beyond its original destination, without the orders or authority of the plaintiff, or his agents, the defendants are liable, otherwise not. But as some evidence has been offered relative to an authority derived from the agent of the plaintiff, the legal import of which the court is called upon to declare, I will therefore further direct the jury, that if they shall believe the testimony offered by the defendants, relative to the sending of the 97 barrels of flour to *Lamberton* or *Bordenton*, and that the agent of the defendants did

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call for instructions at *Philadelphia*, on *Latimer* and *Murdock*, and received none, then the defendants were justified in carrying the flour to *Lamberton*; otherwise not.

And finally, the court is requested to take a general view of this eventful and luckless voyage, and say whether there has not been, in point of law, an injurious and inexcusable delay in the transportation of this flour from *Baltimore* to *Philadelphia*. This is a matter which in this case is so intermingled with all the transactions of the voyage, that the court must leave it in part to the jury to determine. My direction will therefore, here, as in the first question about delay, be hypothetical. If the jury shall believe that the delay was occasioned by the acts of God, that is such as head winds, the founderous condition of the roads, unusually low tides, or the like, the defendants are excusable; but if they shall believe that the delay was occasioned, or in so far as it was occasioned, by the defendants taking a greater quantity of commodities than they had the means of transporting, or by the unskilful navigation and grounding of the vessel, or by any other circumstance which cannot be deemed the immediate and distinct act of God, or the enemies of the country, then the defendants are chargeable for such delay to such amount as the jury shall deem reasonable.

I have taken a survey of this case in its several stages and by parts, because it did not appear to me to be susceptible of being properly taken in the aggregate from any point of view but the one respecting delay; for the flour, when it arrived at *Christiana* where its misfortunes commenced, was separated into several parcels, each parcel was involved in a different predicament, and consequently the principles of law applicable to each was in some respects dissimilar.

The Court therefore refused to give the direction prayed for by the defendants; but did direct the jury, that if they believe that the delay in the land transportation was altogether owing to the founderous condition of the public roads, the defendants are excusable; but if they shall believe that it was to be attributed to the defendants taking more merchandize than they had the power or means to carry in the usual course of transportation, then the defendants are inexcusable, and chargeable for the delay which has been so occasioned.

And the court did further direct the jury, that the testimony offered on the part of the defendants, in relation to the fresh that happened at *Christiana*, was not to be regarded at all, because it did not legally excuse them from answering for any damage the flour had sustained by reason of the said fresh. And did also direct the jury, that the testimony offered by the defendants, in relation to the damage which the flour sustained on board the schooner *Friendship*, did not legally excuse the defendants from answering for the damage thus sustained on board the said

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schooner, and ought therefore to be wholly disregarded.

And the court did further direct the jury, that if they believe from the evidence that 97 barrels of flour shipped on board the sloop *Lettice*, was sent to *Lamberton*, beyond its original destination, without the orders or authority of the plaintiff, or his agent, the defendants are liable, but not otherwise.

The court did moreover direct the jury, that if they shall believe that the delay in the whole line of transportation was occasioned by the acts of God, such as adverse winds, the founderous situation of the roads, unusually low tides, or the like, the defendants are excusable; but if they shall believe that the delay was occasioned, or in so far as it was occasioned, by the defendants taking a greater quantity of commodities than they had the means of transporting, or by the unskilful navigation of the vessels, or any other circumstances which cannot be deemed the immediate and distinct act of God, or the enemies of the republic, then the defendants are chargeable for such delay. The defendants excepted.

2. The defendants further prayed the opinion of the court to the jury, that if they shall believe the testimony offered by the defendants relative to the sending of the 97 barrels of flour to *Lamberton*, or *Bordenton*, and that the agent of the defendants did call for instructions at *Philadelphia*, on *Latimer* and *Murdock*, and received none, then the defendants were justified in carrying the flour to *Lamberton*, otherwise not. This direction the court gave. The *plaintiff* excepted.

3. In addition to all the matters and things herein before stated, relative to an agreement made between the consignee and *Nevin* and *Allen*, two of the defendants, who were the agents of the defendants at *Christiana*, by which they were to send on the said flour to be delivered at *Lamberton* or *Bordenton*, as *Latimer* and *Murdock*, the agents at *Philadelphia*, might direct, the defendants offered this further evidence, that it was then agreed at *Christiana* that the defendants were to receive an additional compensation of ten cents per barrel. The defendants then prayed the opinion of the court, and their direction to the jury, that if they believed this last evidence so offered on the part of the defendants, the plaintiff is not entitled to recover in the present form of declaring in this cause. Which opinion and direction the court refused to give; but directed the jury, that if they should believe the testimony offered by the defendants, relative to the sending of the flour to *Lamberton* or *Bordenton*, the plaintiff is nevertheless entitled to recover; because such new engagement to carry the flour to *Lamberton* or *Bordenton*, is no alteration or modification of the contract declared on, but an excuse for the non-delivery of the flour at *Philadelphia*, which it is proper should come from the

defendants, and is not necessary to be set out in the plaintiffs' declaration. The defendants excepted.

4. The defendants then, in addition to the preceding evidence, and also in addition to the following letter, (previously offered in evidence, from *Boyle*, one of the defendants, to *Hollingsworth* and *M'Kinsey*, others of the defendants, dated *Baltimore* the 21st of October 1813, which was carried by the plaintiff to *Elkton*, with a knowledge of the contents,) viz. "This will be handed you by Capt. *M'Laughlin* of this place, who has shipped 500 barrels flour for *Philadelphia* on board Capt. *Wood Abrams'* vessel. I have no doubt you will do what is in your power for him. Capt. *Abrams* went off without his invoice; Capt. *M'Laughlin* will give it you. No vessels will be loaded here unless those belonging to the line, until you are clear. You may also inform the waggoners, if it will be any encouragement, that no more flour, than what is already contracted for, will be forwarded under 90 to 100 cents. Would also recommend even our own vessels detained with their loads, unless you have back freight, until you get clear of what is at present on hand. The tobacco forwarded on board Capt. *Mitchell* is subject to your last regulation. The line pays no demurrage." They then offered to prove by a competent witness, who during the year 1813 was the clerk of the defendants at *Baltimore*, that *Boyle*, one of the defendants, was the agent at *Baltimore* of the said concern. That an office was kept by *Boyle* during the said year on *Spear's* wharf in the said city, for the reception of applications for the transportation of commodities by the said mercantile line, by the way of *Elkton* and *Christiana*. That the witness was in almost constant attendance with *Boyle* in the said office, during the hours of business; and that a short time before, at and after the 21st of October in the said year, it was the constant practice of *Boyle*, when such applications were made to him, while the witness was so with him in the said office, to inform the applicants of the press of business upon the concern, by reason of the great quantity of commodities which necessarily passed along the said line, and the difficulty at that season of the year of transporting the same with the usual expedition, and that all persons who sent commodities by the line must stand the risk of delay on those accounts, but that the concern would do all in their power to transport the commodities, which it might be thought proper to intrust to them, without delay, and with safety. That the plaintiff was present when the application was made for the transportation of the flour aforesaid; but that the witness did not particularly recollect that any such declaration was made to the plaintiff, or that he had any knowledge thereof. But the plaintiff objected to this testimony for any purpose whatever. And the court was of opinion, that it was not proper to go to the jury for any

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purpose, and therefore rejected it. The defendants excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued on the *first*, *third*, and *fourth* bills of exceptions, before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

Harper, for the Appellants, contended, 1. That the evidence does not support the action, because the contract alleged in the declaration, and the contract proved, are not the same contract, being between different parties. For which reason the general prayer of the defendants below, in the *first* bill of exceptions, ought to have been granted.

2. That the direction of the court in the *first* bill of exceptions, relative to the fresh at *Christiana*, is erroneous; because the fresh was the act of God, and so far as it operated, did excuse the defendants.

3. That the direction in the same bill of exceptions, relative to the damage sustained on board of the schooner *Friendship*, is erroneous, because the damage was caused by the lowness of the water, and the consequent grounding of the vessel, which was the act of God.

4. That the opinion contained in the *third* bill of exceptions is erroneous, because the agreement for 10 cents per barrel additional freight, operated as a new contract, which waived or modified, and in either case annulled the old one, and ought therefore to have been declared on.

5. That the evidence stated in the *fourth* bill of exceptions ought to have been left to the jury—1. Because it furnished proper ground for inferring the fact which the defendants wished to prove. 2. Because that fact was material and proper to be proved.

Martin and *Winder*, for the Appellee, referred to *Amies vs. Stevens*, 1 *Stra.* 128. 2 *Com. on Cont.* 322, 323. *Lyon vs. Mells*, 5 *East*, 428, and *Colt vs. M'Mechen*, 6 *Johns. Rep.* 160.

THE COURT concurred in the opinions of the County Court in all the bills of exceptions taken on the part of the defendants below.

JUDGMENT AFFIRMED.

SOTHEREN'S Lessee vs. REED.

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J D obtained two judgments, one against J S, and the other against S W his surety: writs of *fieri facias* issued upon both judgments. The one against J S was laid upon his lands in April 1802, and the one against S W was entered satisfied at May te m 1802. A *venditioni exponas* issued for a sale of the lands taken under the *fi. fa.* against J S, and was endorsed for the use of S W, and the lands were sold —*Held*, that the payment made by the surety on the judgment against him, and the subsequent entry of satisfaction of such judgment, did not affect the responsibility of the principal debtor, and that such a payment being made subsequent to the levying of the *fi. fa.* against the principal, was to be considered as only operating, at law and in equity, as an assignment of the judgment against him, and therefore, that it was strictly correct to carry on the execution for the use of the surety to its full completion.

APPEAL from *Queen-Anne's* County Court. Ejectment for a tract of land called *Wilson's Adventure*. *Plea*, the general issue.

At the trial the plaintiff read in evidence a grant to *John Wilson*, and *Ann* his wife, for *Wilson's Adventure*, dated the 4th of July 1752, and thence deduced a regular title to *Clement Sewell*, deceased; and proved that said land was laid off as dower to *Cornelia*, his widow, the lessor of the plaintiff, who after the death of *Sewell* intermarried with *John Sotheren*, who is also since dead. The defendant then read in evidence a record of a judgment obtained by *Duhamell*, administrator of *Wilkinson*, against *Cornelia Sewell*, executrix of *Clement Sewell*, in *Queen Anne's* county court at May term 1799; and of a writ of *fieri fa cias* issued on said judgment, returnable to October term 1799, and which was returned *Nulla Bona*. Also a record of a judgment obtained in the name of the state, for the use of *Duhamell*, administrator of *Wilkinson*, against *John Sotheren*, and *Cornelia* his wife, at May term, 1801, in an action brought on the testamentary bond executed by the said *Cornelia*, then *Cornelia Sewell*, with *James O'Bryan* and *Samuel T. Wright* her sureties. Also a record of a judgment recovered in the name of the state, for the use aforesaid, against *Samuel T. Wright*, at the same term, in an action brought on the same bond. Also of a writ of *fieri facias* issued on the judgment against *Sotheren*, and wife, returnable to October term 1801, and the return of *Nulla Bona* thereon. Also of another writ of *fieri facias* issued on the judgment rendered against *Sotheren* and wife, and endorsed for the use of *Samuel T. Wright*, returnable to May term 1802, and the return thereof by the sheriff, that on the 30th of April 1802, he laid the same on, and had seized and taken a tract of land called *Wilson's Adventure*, assigned to the said *Cornelia*, in lieu of all her dower in the lands of her late husband *Clement Sewell*, and caused the same to be appraised, &c. which land remained in the hands of the said sheriff unsold for the want of buyers, &c. Also of a writ of *venditioni exponas*, returnable to October term 1802, commanding the said sheriff to expose to sale the said land, &c. and the return thereof by the sheriff that he did, on the 16th of October 1802, after due notice given, expose to public sale the said land, and that the same was struck off to *Samuel T. Wright*, for the amount of the debt, interest and costs, he being the highest bidder The defendant gave no evidence of an assignment of the said judgment by *Duhamell* to *Samuel T. Wright*. He then read in evidence a deed from *James R. Pratt*, the sheriff, to *Samuel T. Wright*, for the land so seized and taken and sold as aforesaid, dated the 9th of August 1803. And it was admitted by the plaintiff that *Samuel T. Wright* died in June 1810. He also read in

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evidence a deed for the land from *Samuel T. Wright* to *William T. Wright*, dated the 23d of April 1804. Also a deed for the same land from *William T Wright* to the defendant, dated the 23d of December 1806. The plaintiff then read in evidence a record of a writ of *fieri facias*, issued on the judgment herein before mentioned, to have been obtained against *Samuel T. Wright*, returnable to October term 1801, and the return thereof by the sheriff, that on the 6th of November 1801, he laid the same on 50 acres of land, part of a tract called *Forlorn Hope*, and caused the same to be appraised, &c. which land remained in his hands unsold for the want of buyers. Also the docket entry, by which it appeared that the said writ of *fieri facias* and return had been quashed by order of court. The plaintiff further read in evidence the record of a second writ of *fieri facias*, issued on the last mentioned judgment, returnable to May term, 1802, of which said writ no return was made by the sheriff. Also the docket entry, by which it appeared that the same was entered "satisfied plaintiff, says attorney and sheriff." The plaintiff then proved by *T. Murphy*, clerk of *Queen Anne's* county court, that the said entry was made in the hand writing of *Samuel T. Wright*, who was at that time clerk of the said court. He also proved by *Duhamell*, the plaintiff in the aforementioned actions, that immediately after the quashing of the execution before mentioned, as having been issued against the said *Wright*, he received from *Wright* a part of the said debt, and that he received the residue before the next succeeding term of the said court. He then prayed the court to direct the jury, that if they should be satisfied by the evidence that the debt due as aforesaid was paid by *Samuel T. Wright*, the surety of *Cornelia Sewell*, before the sale of the land claimed in the declaration, under the *fieri facias* and *venditioni exponas* issued in the name of the state for the use of *Duhamell*, administrator of *Wilkinson*, for the use of *Samuel T. Wright*, that the sale was irregular, and that the defendant's title under it cannot be supported. But the Court, [*Earle*, Ch. J. and *Purnell*, A. J.] being of opinion, that notwithstanding an execution has been satisfied before sale under it, and that this satisfaction appears of record, a sale afterwards gives the purchaser a good title, unless the defendant moves to quash the writ on its return, refused to give the direction prayed. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Carmichael, for the Appellant, contended, that the surety who paid the money, having omitted to take an assignment of the judgment against his principal, under the act of 1763, *ch.* 23, is precluded from availing himself of that judgment. To show that advantage may be taken in an

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action of ejectment of the defects in the proceedings under which the parties claim, he referred to *Putten vs. Purbeck*, 1 *Vent.* 259. S. C. 2 *Salk.* 563. *Tidd's Pr.* 434 *Stamford vs. Nedham*, 1 *Lev.* 160. *Runn. Eject.* 110. At common law a surety paying the debt has no other remedy to recover it from the principal, than an action for money laid out and expended. That is the only remedy, except under the act of 1763, *ch.* 23, and that act not having been pursued the party cannot avail himself of the judgment against the principal so as to issue an execution thereon for his use. If the regularity of the execution ought generally to be called in question on its return, yet as the lessor of the plaintiff was then married, her coverture was a sufficient legal excuse for the omission to do so in this instance, 2 *Com. Dig.* 505. 1 *Blk. Com.* 442. *Rolle's Ab.* 851, 852; and *Co. Litt.* § 594.

Harrison, for the Appellee, contended, that the execution issued regularly, and was in all respects formal; but that if it were irregular, the sale under it is valid. *Tidd's Pr.* 986. *Jeanes vs. Wilkins*, 1 *Ves.* 195. *Eyre vs. Woodfine*, *Cro. Eliz.* 278. *Amner and Luddington's* case, 3 *Leon.* 89.

JOHNSON, J. delivered the opinion of the court. The plaintiff on his part, showed in evidence a clear title in the lessor of the plaintiff to the land in question. To resist the title of the plaintiff, the defendant read in evidence the records of two original judgments obtained in *Queen-Anne's* county court, one against the lessor of the plaintiff, the *principal*, and the other against *Wright*, her surety. On those judgments writs of *fieri facias* issued, and the one against the lessor of the plaintiff was laid on the land in question. Subsequent to the execution being laid, the surety paid to the plaintiff who obtained the judgments, the full amount of the principal, interest and costs, and the judgment against the surety was entered satisfied. The *fieri facias* which had been laid on the land in question, was returned to May 1802, (at which term the judgment against the surety was entered satisfied,) stating that the property remained on hand for want of buyers—when a *venditioni exponas* issued, under which the land was sold to *Wright*, under whom the defendant claims.

No motion was made to quash the execution in the court below.

The question for this court to decide is, whether or not on these facts the plaintiff is entitled to recover?

The payment made by the surety on the judgment against him, and the subsequent entering of satisfaction, cannot affect the responsibility of the principal debtor. The court consider such a payment, subsequent to the execution being laid, as only operating at law and equity, as an assignment of the judgment against the principal

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debtor, and that therefore it was strictly correct to carry on the execution for the use of the surety to its full completion.

The present is not a new question; the same point was determined on full consideration, in the case of *Norwood vs. Norwood*, 2 *Harr. & Johns.* 238.

JUDGMENT AFFIRMED.

JUNE (E. S.)

NEGRO HANNAH and CHILDREN vs SPARKES.

J J, being the owner of a female slave named H, and his daughter and her husband then living in his family, and having an infant daughter named *Anna*, then in the cradle, which *H*, then a girl of seven years of age, was rocking, calling *H* to him, and putting his hand on her, said that he requested the persons then present to take notice that he then gave *H* to *Anna*, and declared that *H*, and her posterity, should be the property of *Anna*—*Held*, that this parol gift was sufficient in law to transfer the property in *H* to *Anna*.

APPEAL from *Queen-Anne's* County Court. This was a petition for freedom, filed by the appellants. At the trial the petitioners read in evidence the will of *Charles Barniclow*, dated the 26th of December 1811, containing amongst other devises and bequests, the following, viz. "*Seventhly*. My will is, that my negro woman *Hannah*, and her child *Elijah*, shall be free after my death." They then proved that the testator had been in possession of negro *Hannah* for upwards of 20 years before his death, and that after his death *Hannah*, and *Elijah* her son, who was then born, acted as free people, until they were taken possession of by the defendant, (now appellee;) and that the other petitioners, her children, were born whilst *Hannah* was so at large. The defendant then proved by *N. Ireland*, a competent witness, that in the year 1786 the said testator, *Barniclow*, intermarried with his (the witness's) sister *Eleonora*; that in January 1787 they had a child named *Anna*, now the wife of the defendant; that *Barniclow* and his wife lived in the family of *J. Ireland*, the father of the witness, where he the witness also resided; that in March 1787 the child of *Barniclow* and wife being in the cradle, and the witness, one *E. Downing*, and *Barniclow* and wife, being in the room, then and usually occupied by *Barniclow* and wife, his father *J. Ireland*, and his mother, and one *P. Trew*, came into the room; that *Hannah*, then a girl, was rocking the cradle, and that *J. Ireland* called her up and put his hand on her, and requested the witness, *Trew* and *Downing*, to take notice that he then gave *Hannah* to *Anna* the child of *Barniclow* and wife; that he declared at the time that *Hannah*, and her posterity, should be the property of *Anna*, except the first child which she might have, which child, if it lived, should be the property of his daughter *A. Ireland*. That *Hannah* was then about seven years of age. That immediately after this ceremony, *Hannah* returned to rocking the cradle. That from that time *Hannah* continued to sleep in the room of *Barniclow* and wife, and to attend to the child, which was also done by another girl about the house. That *Hannah*, when called on, performed services for any of the family, when not engaged in the service of *Barniclow* and wife, and nursing the

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child. That *Barniclow* and wife, together with their daughter *Anna*, removed from *J. Ireland's* about August or September of the same year, and took *Hannah* with them, who continued in their use and possession for many years thereafter, and that *Anna* lived with her parents until she was two years of age, and then went to live with her grand mother, *Hannah* continuing to live with *Barniclow* and wife. That after the death of Mrs. *Barniclow*, the grand-mother and child went to live with *Barniclow*, and continued to reside with him for one year, when they removed, leaving *Hannah* still in the possession of *Barniclow*. The defendant then proved by *W. Holding*, that in the year 1792, *J. Ireland* was at *Barniclow's* house on a visit, that the witness, and one *Allen*, were called into the house, and that *Ireland* then said he had given *Hannah* to his grand daughter *Anna* before, and to make the thing firm, as they were young, said, now take notice *Holding*, if any claim should come against *Barniclow*, that *Hannah* is not *Barniclow's* property, but the property of his daughter, striking the witness on the back with a whip, and saying, now take notice you remember this in a coming day. The petitioners then proved by *Mary Chairs*, that about 26 years ago her husband, *J. Starl*, now dead, called on *J. Ireland* for payment of a debt, that *Ireland* said he had not the money, and did not know that he ever should have it; that *Starl* told him he had no right to give away his property to *Barniclow*, when he owed money to his creditors; that *Ireland* replied he had not done so; that he had let *Barniclow* have *Hannah* for a debt he owed him. The defendant then proved by *N. Ireland*, that *Barniclow* in 1809 came to his house on his way to a camp meeting, and told him he intended to manumit *Hannah* and her children, to which the witness replied she is none of yours, and you cannot do it; that *Barniclow* then flew in a violent passion, and said he would do as he pleased for he had raised the negroes. The witness said, that he the witness never did claim those negroes as his own. The defendant proved by another witness that *Barniclow*, some years ago, on being asked why he did not sell one of his negroes, to raise money to pay the sheriff who was then present, and who had a demand against him, replied that the negroes were none of his, but belonged to his daughter. He also proved by another witness, that *Barniclow*, before the marriage of his daughter, said that *Hannah* was not his property, but the property of his daughter. The petitioners then proved, that the petitioner *Hannah* remained in the possession of *Barniclow* until his death, and that his daughter *Anna* had not lived with him for 15 years before his death That she intermarried with *P. Potts* in 1807, who died in 1811, when she intermarried with the defendant in 1813. That the petitioners were at large acting as free persons from the death of *Barniclow* until March 1816, when they were taken possession of by the defendant. The parties, in the exami-

1818.

Patrick vs Ridgway

nation of the witnesses, did not enter generally into the declarations of *J. Ireland* and *Barnclow*, but confined them to the particular periods mentioned by the witnesses. The petitioners then prayed the court to direct the jury, that if they believed *N. Ireland's* testimony to be true, that the gift as proved by him, was not sufficient in law to transfer the property to the defendant's wife. This direction the Court, [*Earle*, Ch. J.] refused to give. The petitioners excepted; and the verdict and judgment being against them, they appealed to this court,

The cause was argued before Buchanan, Johnson, Martin and Dorsey, J. by

Carmichael, for the Appellants, and by
Chambers and *Harrison*, for the Appellee.

JUDGMENT AFFIRMED.

June, (E. S.)

Patrick vs. Ridgaway.

The plaintiff in an action of *assumpsit*, having a count in his declaration for sundry matters properly chargeable in an account, which account he filed with his declaration, and there being a judgment by default against the defendant for want of a plea—on executing an inquiry at bar he offered the declaration and account as evidence to charge the defendant, contending that the judgment by default was an admission of the account. The county court decided that the articles themselves, charged in the account, were admitted by the judgment by default, but that the value of the articles, and the amount of the items must be proved by evidence. On appeal by the *defendant*, *reversed*,

Appeal from *Queen Anne's* County Court. This was an action of *assumpsit*. The declaration contained a count for sundry matters properly chargeable in an account, as by a particular account thereof brought into court would appear; a count for money lent and advanced, one for money paid, laid out and expended; and one on an *insimul computassent*. The account referred to in the first count was filed with the declaration. The defendant, (now appellant,) although ruled to plead did not answer the declaration, and a judgment by default was entered against him, and an inquiry at bar ordered at the next term, &c. At the execution of the inquiry at bar the plaintiff, (the appellee,) offered the declaration and account filed as evidence, to charge the defendant, stating to the jury that the judgment by default was an admission of the account. The defendant then prayed the court's opinion to the jury, that by the operation and effect of the judgment by default, the account filed was not admitted. But the Court, [*Earle*, Ch. J. and *Purnell*, A. J.] refused to give the direction, being of opinion that the articles themselves, charged in the account, were admitted by the judgment by default, but that the value of the articles, and the amount of the items, must be proved by evidence on the part of the plaintiff The defendant excepted; and the inquisition and judgment thereon being against him, he appealed to this court.

The cause was argued before Buchanan, Johnson, Martin, and Dorsey, J.

Carmichael, for the Appellant, referred to *Reve vs. Cropley*, 1 *Vent.* 847. *Green vs. Hearne*, 3 *T. R.* 301.

Harrison, for the Appellee, cited 3 *Jacob's L. D.* 552. *Tidd's Prac.* 166, 168. *Eadem vs. Lutman*, 1 *Stra.* 612; *and* 1 *Phill. Evid.* 141.

1818.
Vansant vs Money

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

VANSANT, *et ux.* vs. MONEY'S Lessee.

JUNE, (E. S.)

Appeal from *Kent* County Court. Ejectment for a tract of land called *Partnership*. The *plea*, general issue.

At the trial the plaintiff read in evidence, a grant of the land called *Partnership*, issued to *Daniel Toas* on the 17th of October 1684, and deduced a regular title from the grantee to *Benjamin Money*. He then read in evidence the will of *Money*, dated the 25th of March 1806, wherein, after liberating sundry of his slaves, and devising to his executors a tract of land to be sold by them, and the proceeds to be applied to the payment of his debts, he devised as follows, viz. "*Thirdly*. I give and devise to my brother *Joseph Money*, his heirs and assigns, for ever, one half of all those other lands near *Massey's* cross roads, which formerly belonged to *Joseph Massey* and *Unit Angier*, except that part which I have devised to be sold. *The remaining half of the lands above mentioned, I give and devise to be equally divided between my two sisters, Rosa Meekins and Elizabeth Patterson, share and share alike. Fourthly*. I give and devise to my dearly beloved wife, and my daughter *Rebecca Money*, *all the rest of my real estate* which I may be entitled to have in law and equity, *which is not devised as aforesaid*, on the following terms: To my wife, during her natural life, she supporting, educating and maintaining, my said daughter, in a genteel and liberal way, until she arrives at the age of sixteen; then and after that age my wife to account to her for the yearly value of one half of the said lands, until *the death of my said wife*; then I give and devise the said *land and real estate* to my daughter aforesaid, her heirs and assigns, for ever. And I do give and devise the said lands to my dear wife, her heirs and assigns, should my daughter die before my wife, leaving no children." The plaintiff then proved, that *Rebecca Money*, the lessor of the plaintiff, was the only child and heir at law of the testator, and that the land devised in his will to *Rosa Meekins* and *Elizabeth Patterson*, is a part of the tract called *Partnership*. That *Rosa Meekins'* part thereof are the premises in question, and that *Rosa Meekins*, the devisee mentioned in the will, from whom the defendants claim, survived the testator, and entered upon the premises, and held the same until she conveyed them to the defendants. That *Rosa Meekins* and *Elizabeth Patterson*, and the wife of the testator, died before the institution of this suit. It was admitted that the quan-

B M by his will dated in 1806, after devising lands to be sold by his executors, devised as follows "I give and devise to my brother J M, his heirs and assigns, for ever, one half of all those other lands near," &c. "*The remaining half of the lands above mentioned, I give and devise to be equally divided between my two sisters R M and E P, share and share alike.* I give and devise to my dearly beloved wife and my daughter M M, all the rest of my *real estate*, which I may be entitled to have in law and equity, *which is not devised as aforesaid*, on the following terms: To my wife during her natural life, she supporting, educating and maintaining, my said daughter, in a genteel and liberal way, until she arrives at the age of 16; then and after that age my wife to account to her for the yearly value of one half of the said lands, until *the death of my said wife*; then I give and devise the said *land and real estate* to my daughter aforesaid, her heirs and assigns, for ever. And I do give and devise the said lands to my dear wife, her heirs and assigns, should my daughter die before my wife, leaving no children."—*Held* that R M the sister, took only an estate for life in the lands devised to her.

1818.

Yearly vs Ashley

tity of land devised to the lessor of the plaintiff was about 780 acres, and that that devised to *Rosa Meekins* was about 75 acres. The defendants then prayed the court to direct the jury, that the testimony was not sufficient to support the issue joined on the part of the plaintiff. But the Court [*Earle*, Ch. J. & *Purnell* and *Worrell*, A. J.] refused to give this direction, being of opinion that *Rosa Meekins* took only an estate for life in the lands devised to her, and that the plaintiff was entitled to recover. The defendants excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Carmichael and *Tilghman*, for the Appellants, stated, that the question was, whether or not an estate for life or in fee was devised by the will of *B. Money* to *Rosa Meekins*? To show that an estate in fee was devised to her, they cited *Strong vs. Teatt*, 2 *Burr.* 910, 912. *Frogmorton vs. Holyday*, 3 *Burr.* 1618. *Doe vs. Richards*, 3 *T. R.* 357. *Roe vs. Avis*, 4 *T. R.* 605. *Goodtitle vs. Miles*, 6 *East*, 494. *Robinson vs. Robinson*, 1 *Burr.* 38. *Grayson vs. Atkinson*, 1 *Wils.* 333. *Tanner vs. Wise*, 3 *P. Wms.* 295. *Gulliver vs. Poynts*, 3 *Wils.* 141. *Doe vs. Buckner*, 6 *T. R.* 610; and *Doe vs. Clayton*, 8 *East*, 141.

Chambers, for the Appellee, cited *Roe vs. Holms*, 2 *Wils.* 80. *Right vs. Sidebotham*, 2 *Dougl.* 759. *Denn vs. Mellor*, 5 *T. R.* 558. *Doe vs. Wright*, 8 *T. R.* 64. *Doe vs. Allen*, *Ibid* 497. *Goodright vs. Barron*, 11 *East*, 220; and *Walters vs. Walters*, 3 *Harr. & Johns.* 201.

JUDGMENT AFFIRMED.

JUNE, (E. S.)

YEARLY VS. ASHLEY.

In an action of slander the words charged in the several counts in the declaration were—1. J A, (the plaintiff,) did cut my horses' throats. 2 J A did cut my horses' throats, or why did he not come forward and clear himself, or sue me for his character. 3 I am certain that J A cut my horses' throats, and no body else. 4 I believe J A cut my horses' throats, and no body else—*Held*, (after a general verdict for the plaintiff,) that the words were actionable

APPEAL from *Kent* County Court. This was an action of slander, brought by the appellee against the appellant. The declaration contained four counts—the words charged in the *first* to have been spoken of the defendant, were: "*Isaiah Ashley* did cut my horses' throats. In the *second*: "*Isaiah Ashley* did cut my horses' throats, or why did he not come forward and clear himself, or sue me for his character." In the *third*: "I am certain that *Isaiah Ashley* cut my horses' throats, and nobody else" In the *fourth*: "I believe *Isaiah Ashley* cut my horses' throats, and nobody else." The general issue was pleaded, and there was a general verdict for the plaintiff. The defendant moved in arrest of judgment, and assigned these reasons—1. That the words were not actionable. And 2. That the words, if true, imputed no crime against the plaintiff. The county

court overruled the motion, and rendered judgment on the verdict, and the defendant appealed to this court.

1818.

Benson vs Anderson

The cause was argued before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Chambers, for the Appellant. If the words, as laid in any one count in the declaration, are defective, the verdict being general, judgment must be arrested. To sustain an action of slander, either particular damages must be stated, or the words charged must impute some crime. 4 *Bac. Ab.* 483. The words charged in the declaration should be such, as judgment could be rendered upon, if stated in an indictment; and as the words in question are not those used in the act of 1809, *ch.* 138, *s.* 6, no judgment ought to have been rendered. *Holt vs. Astrigg*, *Cro. Jac.* 184. *Holt vs Scholefield*, 6 *T. R.* 691. *Fiese vs Linder*, 3 *Bos. & Pull.* 372. *Barton vs. Bell*, *Cro. Jac.* 331; and *Barham's* Case, 4 *Coke*, 20.

J. E. Barroll, for the Appellee. To show that the words were actionable of themselves, he referred to *Finch's Law*, 186. *Onslow vs. Horne*, 3 *Wils.* 186. 2 *M'Nally*, 576; and 2 *Esp. Dig.* 81, (497.)

JUDGMENT AFFIRMED.

BENSON VS. ANDERSON.

JUNE.

APPEAL from *Montgomery* County Court. Trespass for entering the close of the plaintiff, (now appellee,) and carrying away negroes, &c. The defendant, (the appellant,) pleaded the general issue, with leave to give the special matter in evidence.

In trespass for entering the close of P, and carrying away negroes, &c. the evidence was, that D took the property, alleging that he took it as a distress for a certain sum for rent due to him from P, and he stated to P the amount of the rent alleged to be due to him; that he was going to take the negroes as a distress for the said rent,—the negroes being on the premises of D, then in the occupation of P, who made no objection to the sum stated to be due for rent, but made no acknowledgment that he did or did not owe any rent, but requested D to take other property instead of the negroes, which was refused.—*Held*, that the evidence was not sufficient to prove that any rent was due, for which a distress could be made, though it would be sufficient to shew that rent was due by the plaintiff

At the trial the defendant gave in evidence, that he by his agent, the witness, took the property stated in the declaration, he the witness alleging, at the time of taking it, that he took the same as a distress for a certain sum for rent due the defendant by the plaintiff; that he stated to the plaintiff the amount of rent alleged to be due from him to the defendant, and told him that he was going to take the negroes as a distress for the said rent, the negroes being then on the said premises of the defendant, then in the occupation of the plaintiff. That the plaintiff made no objection to the sum so stated to be due for rent, nor did he

1818.
Benson vs Anderson

deny that he owed rent, but requested him (the witness,) to take other property instead of the negroes, which was refused. The witness at the same time stated that the plaintiff made no acknowledgment that he did or did not owe any rent, and said nothing more than what is here stated on the subject. The plaintiff then prayed the court to direct the jury, that the evidence so offered by the defendant, that the plaintiff did not deny, upon the taking of the negroes, that any rent was due, is not sufficient evidence to prove that any rent was due, and to support the issue on the part of the defendant. This instruction the Court [*Ridgely*, A. J.] gave. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

Magruder, for the Appellant, contended, that if the evidence was admissible to any extent, though it was not sufficient of itself to entitle the defendant to a verdict, the court erred in rejecting it.

Taney, for the Appellee. A sufficient justification for the taking is not stated in the bill of exceptions. 1. If it were necessary to plead a justification in a case like this, it would be necessary to show a holding as tenant at a certain rent payable at a certain time. The evidence, under the plea of not guilty, with leave to give the special matter in evidence, must be equally particular. It must show the right to take. 2. There is no proof on the part of the defendant. The plaintiff made no admission; and there was no other legal testimony to show that any rent was due. 3. It did not appear that the plaintiff ever held at any time, as tenant to the defendant.

THE COURT were of opinion, that the acknowledgment of the plaintiff, to be implied from the evidence, was not sufficient to support the issue. That it would have been sufficient to prove that rent was due, but not to prove that it was a rent for which a distress could be made. That therefore the judge below correctly decided that the *testimony did not support the issue* on the part of the defendant.

JUDGMENT AFFIRMED.

Barney vs. Prentiss & Carter.

1818. June

Barney vs Prentiss & Carter

An action against common carriers, being the proprietors of a line of stage coaches running between *B* and *P*, for the transportation of passengers and goods and merchandize for hire, for negligence in not delivering a case of Senshaws, delivered by the plaintiff at the stage-office, and entered on the way-bill or transportation, and for which he was to pay a reasonable compensation. The defendants had published in the various newspapers in *B*, (and which was known to the plaintiff,) the time when the stages would start from and arrive at the respective cities, and the publication contained also these clauses: "Fare and allowance of *baggage* as usual. All *baggage* to be at the risk of the owners thereof." "All the *baggage* over 20 lbs. will hereafter positively be charged, and be at the risk of the owners thereof."—*Held*, that if the owners of stage coaches, which carry not only passengers and their baggage, but goods which the owner does not accompany, can by their publications exempt themselves from their liability, which the court did not mean to decide, then such publications should in that respect be plain and explicit. That in this particular case the defendants advertisement was in doubtful and ambiguous language, and that they were as responsible for the loss of the goods, as if no advertisement had been published by them.

Appeal from *Baltimore* County Court. *Assumpsit* against the defendant, (now appellant,) and others, as common carriers, for negligence, &c. The other defendants were not arrested. Plea, *non assumpsit*. The facts agreed upon were these: This suit was brought against the defendant, *J. H. Barney*, and others, to recover the sum of $627, with interest from the 9th of January 1813, they being on and before the 8th of January 1813, the owners and proprietors of a line of stage coaches running between *Baltimore* and *Philadelphia*, for the transportation of passengers, and goods and merchandize for hire. The plaintiffs, (the appellees,) by their clerk *James C. Morsell*, did on the 8th of January 1813, deliver a case of Senshaws at the mail stage office in *Baltimore*, kept by the defendants, to be transported to *Philadelphia* by the defendants, by means of the said stage coach line; that the case of Senshaws was of the value of $627. At the time of delivering the case at the office, the same was entered on the way bill for transportation by the clerk then in the stage office, who entered the case for delivery at *Philadelphia* to *Weems & Benson*, and for the transportation and delivery of which, the defendants were to receive a reasonable hire or compensation, the amount of which was entered on the way bill. Shortly after sending the case of Senshaws, the plaintiffs received a letter from *Weems & Benson*, informing them that the case had not come to hand, and at the same time acknowledging the receipt of a letter and invoice, sent by the plaintiffs by the same mail which should have carried the Senshaws. The case was never transported and delivered at *Philadelphia* by the defendants, nor was the same ever heard of, or accounted for, by the defendants, since the delivery thereof into their possession at the stage office in *Baltimore*. That the following advertisement, to wit: "New Line Expedition—Summer Establishment, through in one day. The new line Expedition will commence her summer establishment on Sunday the 15th inst. (March,) by starting from the *Fountain Inn*, Light street, at 3 o'clock A. M. breakfast at *Havre de Grace*, dine at *Wilmington*, and arrive at an early hour in the evening at *Philadelphia*. Fare and allowance of bag gage as usual. All baggage to be at the risk of the owners thereof. *United States* mail stages start as usual from the *Fountain Inn*. The Eastern mail at 3 o'clock P. M. and the Southern mail at 6 o'clock A M. All the baggage over 20 lb. will hereafter positively be charged, and be at the risk of the owners thereof. *John H. Barney*," &c. was published in the different newspapers in the city of *Baltimore*, and was in the knowledge of the plaintiffs previous to the 8th of September 1813. No money or hire was paid at the time of delivering the case of Senshaws; but the hire or reward was entered on the way bill at the time the said goods were entered for transportation. The

1818. county court gave judgment upon these facts for the plaintiffs; and the defendant appealed to this court.

Barney vs Prentiss & Carter

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Winder and *Murray*, for the Appellant, cited *Jones on Bailment*, 102, 106. *Laws of Carriers*. 11, 25. *Titchburne vs. White*, 1 *Stra.* 145; and *Clark vs. Gray*, 4 *Esp. Rep.* 177.

No Counsel appeared for the Appellees.

JOHNSON, J. delivered the opinion of the court. This is an action on the case brought by *Prentiss* and *Carter* against *Barney*, to recover the value of a parcel of goods placed by them in the possession of the defendant, to be carried *for hire* from *Baltimore* to *Philadelphia*.

The cause was determined on a case stated in favour of the plaintiffs, from which determination the defendant appealed.

The case stated sets forth, that the plaintiffs, the proprietors of a case of Senshaws of the value of $627, delivered them at the stage office, and had them entered on the way bill for transportation, and for which they were to pay a reasonable compensation; that a letter from the plaintiffs to their correspondent in *Philadelphia*, was at the same time put into the post office, which was in due time received; but the goods, from the case stated, do not appear to have been received at *Philadelphia*, nor any account given of them. It also appears that the defendant was, at the time the goods were delivered, the owner and proprietor of a line of stage-coaches running from *Baltimore* to *Philadelphia*, for the transportation of passengers, and goods and merchandize for hire; that previous to the goods in question having been delivered for transportation, the defendant published in the various newspapers in *Baltimore* the time when the stages would start from, and arrive at, the respective cities, in which publication are the following clauses, viz. "Fare and allowance of baggage as usual. All baggage to be at the risk of the owners thereof. All the baggage over 20 lb. will hereafter positively be charged, and be at the risk of the owners thereof." Which advertisement, before the delivery of the case of Senshaws, was known to the plaintiffs.

The question for the consideration of this court is, whether the county court erred in their judgment?

Whether the owners of stage coaches, which are principally engaged in *carrying of persons*, and such baggage as usually accompany them, but who also (as in the case before the court,) carry goods and merchandize for hire, without the owner accompanying them, can, by such advertisements, exonerate themselves from all responsibility for goods and merchandize delivered for transportation, need

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Adreon vs Hawkins

not, in this case, be determined. For, as such carriers would without such publications be responsible for the loss of goods delivered to be carried, if they can, by their publications, exempt themselves from their liability, then the publications, in the language of the exception, should be plain, explicit, and free from all ambiguity. But, as in the case before the court, the defendant, in the advertisement published by him, has used the most doubtful and ambiguous language, he therefore stands in the same predicament as if no publication had been made.

JUDGMENT AFFIRMED.

ADREON vs. HAWKINS.

JUNE.

Where D took a lease of a house from P for one year, on the same terms it had been let by P to J S the former tenant, the rent to be paid quarterly, and D had then the possession of the house under J S; and that possession was continued under the contract between P and D—*Held*, that D became liable to an action for use and occupation, and his liability to that action could not be divested or defeated by his abandoning or relinquishing the possession, or underletting to another, and that liability continued during the term.

APPEAL from *Baltimore* County Court. *Assumpsit* for the use and occupation of a house for three months. The general issue was pleaded. On the trial the plaintiff, (now appellee,) gave in evidence the following contract, under seal, between him and a certain *John Sands*, for the letting of the premises in the declaration mentioned. "Agreement made between *Wm. Hawkins* and *John Sands*, this 2d day of April 1810. That the said *Wm. Hawkins* hath leased and rented to the said *John Sands*, all that lot on South-street, with the buildings and improvements, No. 7, in which he now lives, for one year, at seven hundred and fifty dollars pr. year, to be paid quarterly, and at the end of each quarter, and to give or take a quarter's warning before the expiration of the year. For the true performance of the above agreement, both parties bind themselves in the penalty of fifteen hundred dollars, to be paid by the party failing, to the party complying, with this agreement." And that without any further agreement or contract, *Sands* continued in the possession and occupation of the premises, paying rent in conformity to the reservation in said agreement, until the 18th of November 1813. That then the defendant took the premises from *Sands* on the same terms on which *Sands* had them. That the defendant continued in possession until the 2d of October 1814, and paid rent at the expiration of each quarter to *Sands*, until the expiration of *Sands'* time, and to the plaintiff afterwards, the amount reserved in the agreement between the plaintiff and *Sands*. And the plaintiff further gave in evidence, that some short time before the expiration of the last year of the occupation of the house by *Sands*, the defendant applied to him to be admitted to occupy the premises, on the same terms that *Sands* had done; to which the plaintiff agreed; and the defendant continued in the possession until he quit the same in the manner hereafter mentioned. The defendant then gave evidence, that before the expiration of *Sands'* time in the house, and while the defendant was in possession thereof, under the authority and by permission of

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Sands, the defendant had a conversation with the plaintiff, in which he stated that business was then very dull, and that if it continued to be so after *Sands*' time in the house was out, he would expect him to lower the rent; and that the plaintiff then said, that in that event he would lower the rent. The defendant further gave evidence, that business did continue as dull as it was at the time of the aforegoing conversation, during the whole of the time that the defendant remained in possession of the premises, as is hereinafter mentioned; and that after the expiration of *Sands*' time in the house, and before the defendant removed from it as hereinafter mentioned, but at what precise time the witness could not determine, the defendant spoke to the plaintiff about lowering the rent on account of business continuing so dull, and told him he thought he ought to do it; but the plaintiff replied that the defendant was in the same situation as others who had taken houses on high rent, when business was brisk, and were now obliged to pay the rent, although business was dull. That afterwards the defendant, on the 1st of October 1814, the day before the expiration of a quarter, removed from said premises entirely, and sent the key of the house to the plaintiff, with the following note directed to him, which note and key were left at his dwelling, viz. "I have sent the key of your house, and shall make out your bill, and then I am ready to settle the balance of your rent whenever you please to call." And that on the 5th of October 1814 the plaintiff sent the following answer: "I am informed by my family you have sent out to my house the key of the house I rented you in South-street. This is to inform you, that I do not take the house off your hands until the end of the year you took it for, which ends 2d April 1815; you may send for the key when you please." That on the 4th of October 1814, the plaintiff called at the defendant's new place of business and abode, and received the rent due up to the second day of October, and gave therefor the following receipt, and did not express any dissatisfaction at the removal of the defendant from his premises, or inform him that he should continue to look to him for the rent of the same, viz. "Recd. *Baltimore* 4th October, 1814, from Mr. C. *Adreon*, three hundred and seventy-five dollars, in full for house rent up to the 2d day of this month, including his bill.

Wm. Hawkins."

The defendant further gave evidence, that he never afterwards received said key, nor had any actual possession, occupation or use of said premises, but that the key continued in possession of the plaintiff. And the plaintiff also gave evidence, that there was no such agreement, as is stated on the part of the defendant, about the reduction of rent if business continued as dull as it was during the time that *Sands* occupied the house. And he further gave evidence, that he never took the possession of the house, or in any manner interfered with the same, until after the 2d of April 1814, when the year had expired, other than by suf-

fering the key to remain at his own house, which would have been delivered to defendant at any time he might have called for it. The defendant then moved the court to direct the jury, that if they believed the testimony so given by the defendant, notwithstanding the evidence of the plaintiff, that then the plaintiff is not entitled to recover in this form of action. But the Court [*Hollingsworth* and *Bland*, A. J.] refused to give such direction. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and BUSHANAN, MARTIN and DORSEY, J.

Winder, for the Appellant, stated that there were two questions in the case—1. Whether under the circumstances the plaintiff below could maintain the action for use and occupation against the defendant while he did not occupy or use the house? 2. Whether if the jury believed the evidence of the defendant, it did not in law amount to an assent on the part of the plaintiff, that the defendant should give up the house on the 1st of October 1814?

On the *first* point, he referred to the statute 11 *Geo.* II, *ch.* 19, s. 14. 2 *Com. on Cont.* 509, 512, 514. *Naish vs. Tatlock*, 2 *H. Blk.* 323. 1 *Esp. Dig.* 60, *(20.) Bull vs. Sibbs*, 8 *T. R.* 327. *Gregory vs. Badcock*, 2 *Smith's Rep.* 18; and *Redpath vs. Roberts*, 3 *Esp. Rep.* 225.

On the *second* point, he cited *Redpath vs. Roberts*, 3 *Esp. Rep.* 225; and *Shirley vs. Newman*, 1 *Esp. Rep.* 266.

Williams, for the Appellee, on the *first* point, referred also to the statute 11 *Geo.* II. *ch.* 19, s. 14. 2 *Com. on Cont.* 513, 514, 521. *Bull vs. Sibbs*, 8 *T. R.* 327. 1 *Esp. Dig.* 60, *(20.) Redpath vs. Roberts*, 3 *Esp. Rep.* 225. 1 *Chitty's Plead.* 338. 2 *Chitty's Plead.* 10, (note;) and 3 *Selw. N. P.* 1180.

On the *second* point, he contended, that the decision of the court below did not prevent the defendant from contending before the jury that the contract was dissolved, by consent of the parties, if the jury believed that there was such a dissolution; and the verdict negatives that there was such a rescinding of the agreement.

CHASE, Ch. J. delivered the opinion of the court. It appears by the statement of facts that the defendant in the court below, took a lease of the house in South street No. 7, from the plaintiff, for one year, on the same terms it had been by the plaintiff let to *J. Sands*, the former tenant—the rent to be paid quarterly. At the time of the contract between the plaintiff and the defendant, the latter had the possession, use and occupation of the house under *Sands*, which possession, use and occupation, was continued under the contract between the plaintiff and the defendant, and the defendant became liable to the action for the use and

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occupation, and his liability to that action could not be divested or defeated by his abandoning or relinquishing the possession or underletting to another, and that liability continued during the term.

JUDGMENT AFFIRMED.

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J S wrote to N W the following letter "The small note you hold of J F for $292, if you will be so good and renew it for him, I will guarantee the payment of it at sixty days"—*Held*, that it is such an agreement as will under the statute of frauds sustain an action against J S for the amount of J F's note, he having failed to pay it.

An agreement to pay the debt of another must be in writing, signed by the party to be charged therewith. There must be a consideration for the promise, and that consideration must be set out in the agreement, and can not be the subject of parol evidence. The absence of either of these requisites under the statute of frauds 29 Car. II, are fatal.

Whether J F's note was renewed or not is a matter proper to be left to the jury on the evidence.

APPEAL from *Baltimore* County Court. *Assumpsit.* The declaration contained three counts. The *first* on a promise by the defendant, (now appellant,) that in consideration of forbearance to pay $292, due from *Jacob Fowble* to the plaintiff, (the appellee.) The *second count* The plaintiff, holder of a promissory note drawn on the 16th of September 1806, by *Jacob Fowble*, in favour of the defendant, for $292, payable 90 days after date, the defendant, the payee and endorsor thereof, on the 17th of September 1806, in consideration that the plaintiff would renew the note for other 60 days, and made payable to him the plaintiff, undertook and faithfully promised the plaintiff that if *Fowble* did not pay the note so renewed, at the expiration of the 60 days, that then the defendant would pay the plaintiff the said sum of $292. Averment, confiding in the promise, &c. the plaintiff did, &c. The *third count*. *Jacob Fowble*, on the 16th of June 1806, made his promissory note, payable and delivered to the defendant, promising to pay him, or order, 90 days after date, $292. That the defendant endorsed and delivered the note to the plaintiff. That on the 16th of September 1806, the defendant, in consideration that the plaintiff would renew the note for *Fowble* for other 60 days, then and there undertook and faithfully promised the plaintiff, that if *Fowble* did not pay the note so renewed at the expiration of the 60 days, that then he the defendant would pay to the plaintiff the said sum of $292. Averment, that confiding, &c. the plaintiff did, on the 17th of September 1806, renew the said note for *Fowble*, whereby *Fowble* promised to pay to the plaintiff, or order, 60 days after date, the said sum of $292, for value received. That at the expiration of the said 60 days, the plaintiff showed the note to *Fowble*, and requested payment, but *Fowble* did not pay, &c. The general issue, and the act of limitations, were pleaded.

At the trial the plaintiff gave in evidence, that *Jacob Fowble* drew a promissory note in favour of the defendant, for the sum of $292, for value received from the defendant, and delivered the note to the defendant, who afterwards endorsed and delivered it to the plaintiff in payment of goods purchased by him of the plaintiff. That the note was put in bank by the plaintiff for collection. That *Fowble*, not being in readiness to pay it, the defendant wrote and delivered to the plaintiff the following note, which

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was received by the latter on the 16th September 1806, viz. "*Baltimore*, 16—, 1806. Mr. *Wilson*. Sir, The small note you hold of Mr. *Jacob Fowble* for $292, if you will be so good and renew it for him, I will guarantee the payment of it at sixty days.

Jas. Sloan."

That in pursuance of this request the plaintiff did renew the note therein referred to, by taking the note of *Fowble*, which renewed note is in the words and figures following:

"$292. *Baltimore*, September 17, 1826.

Sixty days after date I promise to pay to *Nixon Wilson*, or order, two hundred and ninety-two dollars, for value received.

Jacob Fowble."

Which note was thus endorsed, "*Nixon Wilson.*" Which last mentioned note was put into bank for collection by the plaintiff, but was not paid when the same became due, or at any other time. The plaintiff also gave in evidence, that the defendant assumed the payment of the sum of money, for which the suit is brought, within three years before the issuing the writ in this cause. The plaintiff further proved to the jury that *Fowble*, shortly before or after the renewed note became due, removed from this state to the state of *Ohio*, where he has continued to reside ever since; and that when the note was so renewed, the plaintiff delivered to *Fowble* the note herein first mentioned, with the defendant's endorsement thereon. The witnesses on the part of the plaintiff also proved, that the first mentioned note drawn by *Fowble* in favour of the defendant, was drawn payable to the defendant at six months, according to the best of their recollection and belief, but that they did not recollect the date thereof. The defendant then prayed the court to direct the jury, that this evidence did not support the declaration in this cause; which direction the Court, [*Bland*, A. J.] refused to give. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Winder, for the Appellant. 1. There is a variance between the engagement alleged in the special count in the declaration, and that offered in evidence. The count is not a legal exposition of the agreement to guarantee. The defendant guaranteed that *Fowble* would pay, but not that if *Fowble* did not pay, he would. 2. The written memorandum, upon which the action is founded, is not such an "*agreement in writing*" as the statute of frauds requires. The policy of this statute is best promoted by adopting a strictly legal interpretation of its provisions; and accordingly the courts of *Great Britain*, and this country, have preferred such a construction as will give to every word its

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proper technical signification. *Chaplin vs. Rogers*, 1 *East*, 194. *Chater vs. Becket*, 7 *T. R.* 200. *Anstey vs. Marden*, 4 *Bos. & Pull.* 132. *Grant vs. Naylor*, 4 *Cranch*, 224. The word *agreement*, therefore, used in the clause in the statute which governs this case, must be taken according to its strict legal signification, that is, a *mutual* contract between two or more persons, by which each comes under an obligation to the other, and upon which each acquires a right to what is promised by the other. *Wain vs. Warlters*, 5 *East*, 10. 1 *Pow. on Cont.* 6. 1 *Com. Dig.* 400. The memorandum in this case was not such an agreement—1st. Because it does not contain a good and sufficient consideration. *Wain vs. Warlters*, 5 *East*, 10. *Sears vs. Brink*, 3 *Johns. Rep.* 210, 215. 2d. Because there is neither mutuality of obligation, nor right of action. The engagement was all on one side. The plaintiff was not bound by it; it was, therefore, *nudum pactum*. The contract was altogether executory. *Egerton vs. Matthews*, 6 *East*, 307; and *Cooke vs. Oxley*, 3 *T. R.* 653.

Hoffman, for the Appellee. It has been contended on the part of the appellant—1. That the letter from the defendant to the plaintiff is not a sufficient note or memorandum to satisfy the requisitions of the statute of frauds, (29 *Car.* II, *ch.* 2, *s.* 4.) because it was not *signed by both parties*. 2. That there is no *mutuality or reciprocity* of remedy; that if this should be held good as to the defendant, he has no remedy to compel the plaintiff to renew the note. 3. That *no consideration* appears on the face of the letter, and, therefore, is embraced by the decision in *Wain vs. Warlters*, 5 *East*, 10, in which the *consideration* was held to be an integral part of the agreement, and must distinctly appear, and that no evidence *de hors* the writing could be received to disclose the consideration. 4. That the consideration, if any, is *executory*, and no parol evidence should be allowed to show its execution.

1. The objection to a memorandum, under *any* of the sections of the statute, has been considered as finally put to rest by a number of cases. The case of *Champion vs. Plummer*, 1 *Bos. & Pull*, 254, from which the doctrine of *signature by both parties* sprung, was on the 17th section of the statute, which requires, in the sale of goods, a memorandum "signed by the *parties* to be charged by the contract," a phraseology differing from the 4th section, which relates to collateral undertakings, and which requires the memorandum to be "signed by the party to be charged therewith." But even on the 17th section, this doctrine was found, in its practical application, to be highly inconvenient, and sometimes *absurd*, the case was therefore soon *doubted*, then *qualified*, and finally *expressly overruled*. In support of these positions, the court are referred to *Seton vs. Slade*, 7 *Ves* 275. *Coles vs. Trecothick*, 9 *Ves.* 235. *Fowle vs. Freeman*, *Ibid* 351. *Bailey vs. Og-*

den, 3 *Johns. Rep.* 418. *Egerton vs. Matthews*, 6 *East*, 307. *Roget vs. Merritt*, 2 *Caine's Rep.* 120. *Rob. on Frauds*, *Advir.* VI. *Sugden on Vend. and Pur.* 43, *(note)* In fine, no case can be produced which requires the signature of both parties to a memorandum under the 4th section; the established doctrine is conceived to be, that on all of the sections which require signing, the statute demands no more than the signature of the *party to be charged.* In the case at bar the name of the party to be charged is signed, which is all that either the *English* or *American* authorities *now* in any case require.

2. The next objection is equally untenable. The case of *Lawrenson vs. Butler*, 1 *Sch. & Lefr.* 20, does not contradict this assertion. *Stapp vs. Lill*, 1 *Camp.* 242, is, however, decisive on this point. From this, and many other cases which might be cited, it appears that the doctrine of mutuality, contended for, is groundless, and certainly unsustained by authority; for it frequently is the case that no action will lie to compel a performance of *that*, which, when performed becomes a *valid* consideration to sustain a promise. This criterion, by which we are called on to test the responsibility of *one*, by the right of a cross action in the *other*, is, perhaps *specious* but not sound. But the very objection in the present case is founded, on a *petitio principii*, for there can be no reason why the defendant could not have sustained a special action, were there proof of a promise to renew the note.

3. The difficulty which has been raised in this point is grounded on the assumption that no *consideration* appears on the face of the paper, and also from inattention to the controling difference between no consideration, and *some*, though not a very explicit one. In the present case there is a full and adequate consideration *broadly* expanded on the face of the letter, and that nearly every memorandum, to be found in the books as sufficient, is not more explicit, *in its consideration*, than the present. This doctrine has its chief, and only support in the case of *Wain vs. Warlters*, 5 *East*, 10. But that case differs from the one at bar in several material respects. 1st. It will be perceived that in that case the memorandum discloses *no consideration* whatever, it contains nothing more than a mere *nude* promise, which at common law, and, since the statute, can be creative of no legal obligation. But in the case at bar the defendant's letter itself states clearly the consideration of his undertaking, viz. the renewal of *Fowble's* note, as he calls it, for 60 days. 2d. Another difference is, that *Warlters* was an entire stranger to the original transaction. He was never known in it until he came forward, and by his letter promises to pay *Waine &* Co. the amount of *Hall's* acceptance. Not so in the case at bar. It may here also be remarked, that there was no necessity for any consideration proceeding from *Fowble* to the defendant; it is sufficient if a consideration moves from the plaintiff to the defendant, for the defendant would be bound to the plaintiff,

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were his promise entirely *ex gratia* as to *Fowble*, and though upon that promise no action would lie against him by *Fowble* A consideration, it should be remembered, is constituted by *any damage*, or any *suspension* or *forbearance* of the plaintiff's right, or any *possibility of a loss* occasioned to the plaintiff by the promise of another, and such promise will be binding, although *no actual benefit* accrued to the *party undertaking*. So in the case at bar; had the *fact* been that the defendant was to receive *no benefit*, he would still have been bound by his promise. *Villans vs. Mierop.* 3 *Burr.* 1673. 1 *Saund.* 211. b. 2 *Saund.* 136. The cases of *Egerton vs. Mathews*, 6 *East*, 307, and *Sears vs. Brinks*, 3 *Johns. Rep.* 210, were relied on as *confirmatory* of the doctrine of *Waine vs. Warlters*. *Egerton vs Mathews* occurred on the 17th section of the statute, which requires a memorandum of the *bargain*, signed by the *parties* to be charged Here the court held that the *bargain* was sufficiently explicit, though *no consideration* was expressed, which they considered would not be the case had the word *agreement* been used, as was the case in *Waine vs. Warlters* on the 4th section. This case is considered to have no application whatever to the case at bar, and if attended to will be found not a little *absurd* in its consequences. The case of *Sears vs. Brinks* is still more harmless than the preceding two. It occurred on the 11th section of the statute of frauds of *New York*, which corresponds with the 4th clause of the 4th section of the statute of frauds of 29 *Car.* II, which relates to the sale of lands. On the memorandum in that case it was held, that the action was not maintained, as the consideration does not appear on the face of the writing. Here the paper appears to contain *no consideration* for taking *Peter Newkirk's* bargain, but none was necessary. This case appears to be subject to the absurd conclusion before noticed, as resulting from *Egerton vs. Mathews*. For this case extends the doctrine of *Waine vs. Warlters* beyond the 1st and 2d clauses of the 4th section, to which Mr *Roberts* holds it to be confined; whereas it is manifest that the 4th clause, which relates to *land*, and the 17th section, the sale of *goods*, can never require any other memorandum than such as dissolves a bargain for the purchase and sale of land or goods This case, then, of *Sears vs. Brinks*, has no application, if it be considered that the memorandum discloses no consideration. If it does disclose a consideration, viz. money for the purchase of land, it, like the case of *Egerton vs. Mathews*, has disclosed all the consideration which the statute could demand, even if the sections all used the word agreement. In fine, it may be said, that all of the cases, on this doctrine, which have occurred on any other sections or clauses of the statute, than the 1st and 2d clauses of the 4th section, have gone much beyond the level of the case of *Waine vs. Warlters*, and at the same time when there is not half the necessity for particularity in this respect that there is

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in cases occurring on the above mentioned two clauses. And it may also be further said, that in all of the cases which have occurred even on these two clauses of the 4th section, the memorandums will be found to contain *no consideration* whatever, and consequently not parallel with the case at bar, which *does* express a consideration. These cases, so much relied on by the counsel for the appellant, being removed out of our way, on the ground that they have no application to the case at bar, let us *gratia argumenti* inquire, whether the cases themselves be of *undoubted authority*. The case of *Waine vs Warlters* is the fountain of this doctrine. It has been at various times *doubted*, *qualified*, *extended*, *restricted*, *praised*, *censured* and *denied*. The case of *Stadt vs. Lill*, 9 *East*, 348, is considered to be a clear *qualification* of the generality of the doctrine of *Waine vs. Warlters*. The court there held the plaintiff to be entitled to recover. But the case of *Waine vs. Warlters* has been objected to still further; for in *Minet Exparte*, 14 *Ves.* 183, it is considered of no weight or authority whatever. From the preceding observations it may be briefly stated, that the case at bar stands unaffected by the cases relied on by the counsel for the appellant; and further, that if it came within the very letter of these cases, they are themselves of very questionable authority. The observations on this *third* objection may be closed by a few observations on letters of credit. Letters of credit were well known to the commercial world long anterior to the Stat. 29 *Car.* II. From the enactment of this statute to the year 1804, their validity, in their ordinary phraseology, was never questioned. Soon after the case of *Waine vs Warlters*, it was perceived that letters of credit might be affected by the doctrine of that case, for in no instance do they state the consideration on which the request is made. In the case of *Stadt vs. Lill*, the court was obliged to qualify the doctrine of *Waine vs. Warlters*, and in *Minet Exparte* to disregard it. So likewise in *Grant vs. Naylor*, 4 *Cranch*, 224, the letter of credit expresses no consideration. But the court would not listen to the doctrine of *Waine vs. Warlters*, nor would they harbour a doubt as to the sufficiency of the written engagement, on any ground arising out of the Statute of Frauds. So also *Eddowes vs. Niell*, 4 *Dall.* 133. *Robbins vs. Bingham*, 4 *Johns. Rep.* 476. Now what is the consideration which sustains all of these *collateral* undertakings? The sole consideration is the delivery of the goods or money to the *writer's* friend. So in the case at bar, all the consideration which is required does appear on the paper, viz. the forbearance to sue the writer's friend *Jacob Fowble*, and the giving of him further time to pay the debt.

4. This objection being *last*, we certainly consider it the *least*. It is of so little *plausibility* even, that we scarce know how to reply to it. The statute speaks of agreements, promises, undertakings, bargains, but not of the

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execution of these agreements, &c. Were the *execution* of these agreements required to be evidenced by a writing, more would be demanded than the statute calls for. The statute requires *written* evidence only as to the *existence* of a consideration; the execution of this consideration often *lies in verbis*, and may always be *proved* by parol. In the case at bar *Nicholson*, Ch. J. observed, that "the consideration being executory, and a precedent condition, must be proved by the plaintiff, for although the *consideration* must not lie *in verbis*, the *performance* of this consideration may be proved by parol evidence." The phraseology of the defendant's letter should have put an end to every doubt. He writes to the plaintiff to do an act in favour of his friend *Fowble*, and prejudicial to the plaintiff. Without searching for any consideration *de hors* the letter, we find all the requisite consideration; for it is quite sufficient that by his promise, the plaintiff has subjected himself to the "*possibility of a loss*;" to "*any damage*," or "*suspension or forbearance of his right*." The cases of *Nerot vs. Wallace*, 3 *T. R.* 24, and *Pullin vs. States*, 2 *Hen. Black.* 312, are fully in point. It is at once conceded, that it is just as necessary that a sufficient consideration should exist for a written promise, *since* the statute, as before. The common law always required a consideration; the statute adds as a requisite *evidence* in certain cases, that the promise, &c. should be in *writing*. Was not *forbearance* a good consideration prior to the statute? Certainly; for if C had requested A to forbear to sue B, and A had forborne, this was a valid promise at common law. 1 *Roll's Ab.* 27, *pl.* 49. And if such a promise is now made *in writing*, it is good. *King vs. Wilson*, 2 *Stra.* 873.

The present memorandum satisfies every requisition of the statute—for 1st. It is in *writing*, and has sufficient certainty to constitute a promise. 2d. It is signed by the party charged. 3d. The consideration is manifest on the face of the paper. 4. If not, it still materially differs from *Waine vs. Warlters*, and all confirmatory cases—as they contain a mere *nude* undertaking. 5. It has all the reciprocity that the law requires. 6th. The consideration is evidenced in writing, and the *execution need* not be. In nearly every case the consideration will be found to be executory, and no case can be found which sanctions the distinction, in this respect, between executed and executory considerations.

Buchanan, J. delivered the opinion of the court. The question raised in this case is, Whether the letter from the defendant below to the plaintiff, of the 16th of September 1806, is such an agreement as will, under the statute of frauds, sustain an action against the defendant for the amount of *Fowble's* note, *Fowble* having failed to pay it? Of which no doubt is entertained.

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An agreement to pay the debt of another must be in writing, signed by the party to be charged therewith. There must be a consideration for the promise, and that consideration must be set out in the agreement, and cannot be the subject of parol evidence. The absence of either of these requisites to a good agreement, under the statute would be fatal; but here neither is wanting. The letter to the plaintiff is signed by the defendant; the renewal of *Fowble's* note for $292, is the foundation of the guarantee, and is a good and sufficient consideration, and that consideration appears on the face of the writing. When the renewal took place, the consideration attached, and the liability of the defendant commenced. And whether *Fowble's* note was renewed or not, was a matter proper to be left to the jury on the evidence in the cause.

JUDGMENT AFFIRMED.

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D in 1811, executed a mortgage of certain leasehold property to F, to secure him as an endorser of certain promissory notes, and which F, on the death of D, was compelled to pay. The mortgage was not recorded, from neglect, and not from any fraudulent intention. F filed a bill in chancery against the administrator and representatives of D, to obtain a decree for a sale of the mortgaged premises to satisfy the amount paid by F—*Decreed*, that the property be sold, &c. On appeal—*Held*, that the question, whether the mortgage was fraudulent with reference to the creditors of D, did not arise, as the answers did not state the insufficiency of the estate of D to satisfy his creditors, and to that point there was no proof—And *quere* as to the true construction of the *eleventh* section of the act of 1785, *ch.* 72; and how far the defendant could call to his aid the provisions of that act in a case where the complainant does not seek to record his mortgage, but claims relief under that branch of equitable jurisdiction, which enforces contracts made *bona fide*, and for a valuable consideration.

APPEAL from the Court of Chancery. The bill in this case was filed by the complainants, (now appellees,) against the administrator and representatives of *J. M. Dennison*, to obtain a decree for the sale of a house and lot in the city of *Baltimore*, alleged to have been mortgaged to them by *J. M. Dennison*, in his life-time, to satisfy a debt due from *Dennison* and his partner, *Thomas L. Savin*. The substance of the case, as disclosed by the record, is this—*Dennison & Savin* were partners in trade in *Baltimore*; as were also the complainants. They agreed mutually to endorse for each other, to obtain discounts from the banks; and at the same time agreed mutually to secure each other, and for this purpose *Dennison* made a mortgage of the premises in question to the complainants; and *Fulton*, one of the complainants, made a mortgage of a house and lot he held in *Baltimore* to *Dennison & Savin*. These transactions took place about the 31st of July 1811. Each party reciprocally endorsed for the other to a considerable extent; and finally, upon the death of *Dennison*, which happened in August 1813, the complainants took up the paper they had endorsed and loaned to *Dennison & Savin*, to the amount of $4462 75. *William Woods & Westly Woods*, were also partners in trade, under the firm of *William Woods & Son*, and had also loaned and endorsed for *Dennison & Savin* to a sum exceeding $3000, to secure which *Dennison* had agreed to mortgage the aforesaid house and lot, and had given directions to prepare a mortgage to that effect a short time before his death, but he was taken ill and died before he could execute it. Neither the mortgage from *Dennison* to the complainants nor from *Fulton*

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to *Dennison & Savin*, were recorded. It was alleged by the complainants that this was the result of forgetfulness and inattention, and proceeded from no fraudulent intention. It was also alleged by the defendants, that it was mutually agreed, at the time of executing the mortgages, that they should not record them. *Dennison* died intestate, leaving a daughter, *Sarah*, the wife of *T. L. Savin*, and a son named *Marcus*. *Woods* was the administrator of *Dennison*, and contended that the complainants were only entitled to come in *pari passu* with the other creditors. The mortgage premises were leasehold.

Kilty, Chancellor, (July term 1816.) decreed, that the premises mentioned in the mortgage from *Dennison* to the complainants should be sold to satisfy the debt due to them. From that decree the defendants appealed to this court.

The cause was argued before Buchanan, Johnson, Martin, and Dorsey, J.

Winder, for the Appellants. The mortgage was not recorded, and the bill prayed for a sale of the mortgaged premises. The chancellor, without directing the mortgage to be recorded, decreed a sale of the property to pay the debt, to secure the payment of which it was executed. The only ground on which the complainants could come into a court of chancery was under the act of 1785, *ch.* 72, s. 11, to have the mortgage deed recorded. A fraud was committed on the creditors of *Dennison*, and of *Dennison & Savin*, by withholding the mortgage from record.

Martin, (Attorney General,) and *Pinkney*, for the Appellees. The only question is, whether, though the deed was not recorded, the complainants have not such an equitable lien on the property against the heirs of *Dennison* as to be entitled to have it applied to the payment of their debt? By the general law of the court of chancery, previously to the year 1785, this mortgage would be considered a contract in equity which the court could decree upon on equitable grounds, as a particular lien. The court would have viewed it as a mortgage of a particular debtor, and liable to every equity to which the mortgagor would be liable. Here the mortgage not being recorded, was not owing to any fraudulent intention. It was not incumbent on the complainants to prove that there was no fraud, because none was alleged in the answers. Is the mortgage not on a meritorious consideration, and the peculiar favourite of the court of chancery? But it is said the complainants have lost the effect of their mortgage in a court of equity, because it was not recorded. The mortgage not being recorded is not valid in point of law. How is the defect to be supplied, but by the court of chancery, which will give efficacy to it, and can do so by considering it as a contract. Every mortgage is a contract, even without cove-

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nants, but here there are covenants. It is a mere agreement, and as such a court of equity can carry it into effect. The act of 1785 does not interfere with the general powers of the court of chancery, or to any exclusive equity which it possessed before. It only restricts the particular case legislated upon by the act. To show what was the powers of the court of chancery in a case similar to the present, and the nature of special liens, they referred to *Pow. on Mortg.* 460, 469. *Burn vs. Burn*, 3 *Ves.* 573. Notice to general creditors was not necessary. *Pow. on Mortg.* 585, 586. There is no allegation in the bill or answers that *Dennison & Savin* were insolvent, or that *Dennison* was insolvent. The creditors are not, therefore, made parties, and cannot be affected by this decree. The bill and prayer in it are that the particular piece of property mortgaged should be made liable to pay the particular debt.

Winder, in reply, referred to 1 *Madd. Chan.* 329. *Lloyd vs. Collett*, 4 *Bro. Ch. Rep.* 469; and S. C. 1 *Atk.* 12, *(note.)*

Dorsey, J. delivered the opinion of the court. It has been contended on the part of the appellants, that the decree of the chancellor ought to be reversed, as the mortgage from *Dennison* to the appellees was fraudulent, with reference to the creditors of *Dennison*, and *Dennison & Savin*; and the *eleventh* section of the act of 1785, *ch.* 72, has been relied on to establish this position. As the answers do not state the insufficiency of the estate of *Dennison* to satisfy his creditors, or the insolvency of the firm of *Dennison & Savin*, (and to those points there is no proof in the cause,) the question of fraud, with reference to creditors, does not arise in the cause. This view of the case renders it unnecessary for the court to decide on the true construction of the statute referred to, or to give any opinion on the question, how far the defendant could call to his aid the provisions of the said statute, in a case where the complainant does not seek to record his mortgage, but claims relief under that branch of equitable jurisdiction, which enforces contracts made *bona fide*, and for a valuable consideration.

DECREE AFFIRMED.

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Where new parties are added in a case in the court of chancery, after the testimony is taken, the cause shall be heard on bill and answer as to such new defendants—As where a new defendant in his answer admitted all the allegations in the bill, in relation to him, no testimony was wanted, and he could not in any manner be injured or affected by the evidence taken before he became a party, and the making him a defendant furnished no reason for taking the testimony over again as against the other defendants

A sale made by a trustee appointed by will set aside on the ground of fraud

APPEAL from the Court of Chancery. The bill was filed by the appellees against the appellants, and stated, that

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Smith vs Baldwin

Elijah Brown, by his last will, dated the 25th of August 1809. devised his land for three years to *Obadiah Smith*, one of the defendants, and at the expiration of three years, the land to be sold by his executor, and the proceeds, after payment of debts and legacies, to be divided among his brothers and sisters named in the will. The executor was empowered to convey. and *Obadiah Smith* appointed executor. The testator died on the 23d of September 1809. *Ruth Currens*, one of the defendants, was a sister of the testator, and entitled to a share of the surplus, after paying debts and legacies. She was not a party to the original bill. By advertisement dated the 29th of August 1812, inserted in a newspaper in *Frederick-town*, the executor offered the land for public sale on the 23d of September, if not sold before at private sale. On the 12th of September 1812, *Smith* entered into articles with *Philip Miller*, another of the defendants, for the sale of the land at private sale, the first payment to be made, and possession given, and the land conveyed on 23d of September. When the three years expired *Smith* married the only daughter of *Philip Miller*, the vendee, and has continued to occupy a part or perhaps the whole of the land since the sale. The bill alleges that this sale was made by the executor in violation of his trust—that it was sold too soon—that the terms were in violation of the will—and that the land was sold to *Miller* by the executor, for the purpose of getting it conveyed to himself, or with an understanding that he was to remain in possession, and to inherit it in right of his wife. That others would have given more for it if a fair opportunity had been afforded them, and that *Smith* and *Miller* had combined to injure and defraud the complainants. The answers of *Smith* and *Miller* both state, that the sale was fair, and denied all combination. *Ruth Currens*, who was entitled to a share of the proceeds of the sale after the payment of debts and legacies, was not a complainant or defendant. A commission to take testimony issued on the 15th of June 1815, and was returned to February term 1816. Several of the complainants, after the sale, received their proportions of the proceeds. At July term 1816, the case was set down for hearing at the next term. On the hearing at December 1816, the Chancellor suggested that *Ruth Currens* ought to have been a party; and at December term 1816, leave was given, on petition of complainants, to amend the bill by making *Ruth Currens* a party defendant which was done; and process prayed accordingly, at February term 1817. At the same term her answer was put in by consent, admitting the sale and purchase, as stated in the bill. On the day following, the Chancellor passed his decree setting aside the sale, and appointing a new trustee to sell. From this decree the defendants, *Smith* and *Miller*, appealed to this court.

The cause was argued before BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

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Tyler vs Bowie

Taney, for the Appellants, contended, 1. That the evidence did not support a charge of fraud in the sale. 2. That *Ruth Currens* was not made a party until after the testimony was taken; and as the testimony could not therefore be evidence against her, it could not be used against the other defendants for her benefit.

On the *second point* he cited *Mitf.* 16, 17. *Cooper's Plead.* 680. *Turner, et al. vs. Worthington, et al.* in this court at June term 1817; and the act of assembly 1785, *ch.* 72, *s.* 14.

Pigman, for the Appellees, cited 1 *Harr. Chan. Prac.* 61, 109, 110. *Hind's Prac.* 25, 378; and *Clayton, et al. vs. Anderson*, in the court of chancery, where the rule of practice respecting parties was, he said, established by the Chancellor.

Buchanan, J. delivered the opinion of the Court. The objection urged to the decree on the ground that all the evidence in the cause was taken before *Ruth Currens* was made a party, and that either another commission ought to have issued, and testimony been taken *de novo;* or that the cause should have been heard on bill and answer as to all the defendants, without reference to the testimony, is unsupported either on principle or authority. *Ruth Currens*, in her answer, admits all the allegations in the bill; in relation to her, therefore, no testimony was wanted, and she could not in any manner be injured or affected by the evidence taken before she became a party; and the making her a defendant furnished no reason for taking the testimony over again, as against *Smith* and *Miller*. The rule is, that where new parties are added, after the testimony is taken, the cause shall be heard on bill and answer as to such new defendants.

The Court thinks the decree of the Chancellor is right on the merits.

DECREE AFFIRMED.

Tyler, *et al.* vs. Bowie's Adm'rs.

June.

Where a bill is filed in the court of chancery for the sale of the real estate of a deceased for the payment of his debt, on the ground that the personal estate has been exhausted, the executor or administrator of the deceased must be made a party.

Appeal from the Court of Chancery. The complainant below (the appellees' intestate,) filed a bill against the defendants, (the appellants) as the heirs at law of *R. B. Tyler*, deceased, for the sale of the real estate of which he died seized, to discharge a debt due to the complainant, for money paid as a surety for the deceased in a bond to the state—the personal estate being exhausted. The Chancellor decreed a sale accordingly, the claim of the complainant having been established, &c. From that decree the defendants appealed to this court.

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The cause was argued before BUCHANAN, EARLE, MARTIN and DORSEY, J.

Magruder, for the Appellants, made two objections to the decree. 1. That nothing was due from the ancestor of the defendants to the complainant. And 2. That the administratrix of *R. B. Tyler*, ought to have been made a party, to render an account of the personal estate, which must be shown to be exhausted before recourse can be had to the real estate.

On the *second point*, he insisted that the insufficiency of assets must be established by the complainant, and that that could be done only by the answer of the administratrix. She should be required to show that she had administered the personal assets. She might show, if made a party, that payments had been made by her. She was bound to pay the debt to the state, which had a preference; and she would be guilty of a *devastavit* in paying other debts, and not that due to the state. He cited *Knight vs. Knight*, 3 *P. Wms.* 331.

Stephen, for the Appellees, contended, that the act of 1785, *ch.* 72, *s* 5, annulled the *English* law so far as to make it unnecessary that the executor or administrator of the deceased should be made a party in a proceeding like the present; and that the uniform practice under that law, in a case similar to this, had not been to make the executor or administrator a party—the act not requiring it on a bill to affect the real estate. Why is it necessary? To show, it is said, that there are no personal assets. The defendants are bound to show assets if there are any, and it is not for the complainant to prove a negative. The answer of the administratrix could not be evidence in favour of the heirs, but her testimony would be, where she is not made a party. It has been decided that there is no privity between the administrator and the heir. A judgment against the administrator is not evidence against the heir. The act of 1785 was intended to embrace peculiar cases, and was particularly applicable to our own state. The chancellor is to be satisfied of the justice of the claim, and that there are no personal assets. The proceedings of the orphans' court on the settlement made by the administratrix are at least *prima facie* evidence, and if not rebutted are considered conclusive evidence upon the subject of the deficiency of assets. Where a statute is in any manner equivocal, and there has been a long and uniform construction given to it, the court will not give a new and rigid one to it. There may be some cases in which the administrator has been made a party on an application for a sale of the real estate, but the general practice has been otherwise.

Taney, in reply. The reasons assigned in *Knight vs. Knight*, why the administratrix should be made a party, is

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sufficient even if there were no other adjudged cases. Where there are two funds, personal and real, the complainant need not bring the heir before the court when resorting to the first fund for payment of his debt, but in resorting to the other, he must make the administrator a party. It is not merely to show the sufficiency or insufficiency of assets that this must be done, but to show whether or not the debt has been satisfied, which might be done by the administrator, without the knowledge of the heir The act of 1785 has made no change in the law in this respect, and cannot admit of the construction contended for by the appellees' counsel. The sole object of that law was to give the chancellor power to sell the real estate of a deceased in certain cases. In all other respects the law remains the same. Although that act, for instance, is confined to minors and lunatics, yet could not the devisees, or other persons to whom land may descend, or who are jointly interested in it, be called upon? But under the construction given, although there may be persons jointly interested with the minor or lunatic, the creditor need only make the minor or lunatic a party, and take no notice of the persons jointly interested.

DECREE REVERSED.

SNOWDEN, *et al.* vs. THOMAS, *et ux.*

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A and B having partnership transactions of several years standing, it appeared by their partnership books that A was indebted to B $97 77 in 1773. $749 81 in 1778, and $374 06 in 1783, amounting to $1221 04. In 1794 A pays to B $1221 10, refusing to pay any interest, and B gave him a receipt in full of all claims. B files his bill in chancery in 1807 against A, to recover the interest —*Decreed* that the interest was recoverable.

APPEAL from the Court of Chancery. The bill was filed by the appellees on the 1st of January 1807. It is stated that one *Richard Snowden* being seized of the *Patuxent* iron works, &c. devised them to his three sons *John*, *Thomas* and *Samuel*,, subject to the dower of his wife *Elizabeth*. The iron works were carried on after the death of the devisor by the widow and three sons, until the death of *Thomas*, which happened previous to 1772. He devised his interest to his three sons *Richard*, *Henry* and *Thomas*, as joint tenants. After the death of the last devisor the works were carried on in the name of the widow of *Richard*, his two sons, and the devisees of *Thomas*, until the death of *Elizabeth*, the widow, in 1772. After her death they were carried on by the two sons of *Richard*, and the devisees of their brother *Thomas*, till the latter part of 1772, when *Richard* died leaving a widow, *Elizabeth*, and an only child, *Mary*, one of the complainants. The estate of *Richard* was administered on by his widow. At the death of the last named *Richard*, a balance was due to him from the partnership of £317 16 9, as appears by the books of the company. *Henry* died soon after his brother *Richard*, leaving his estate to his brother *Thomas*. Soon after the death of *Richard*, the father of the complainant *Mary*, his widow *Elizabeth* married one *Orme*, who soon afterwards died leaving no issue, and in 1775 his widow died leaving the

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complainant, *Mary*, her only child, to whom she left her estate, making *Thomas Snowden*, her executor, and also guardian of *Mary*, the complainant. At the time of the death of Mrs. *Orme*, there was due to her, from the partnership of *Samuel*, *John* and *Thomas Snowden*, in her own right, and as administratrix of her husband *Richard Snowden*,, a further sum of £140 5 5. The complainant, *John C. Thomas*, intermarried with the complainant, *Mary*, in 1788. In 1794 the complainant received from *Samuel*, *John* and *Thomas Snowden*, by the hands of *Thomas Snowden*, £457 18 3, in part payment of the sum due as aforesaid. That *John* and *Samuel*, although they admitted that sum to be due, yet they refused to pay interest, because the money was not demanded. The bill also stated the death of *Samuel*, and who are his executors, and also the death of *Thomas*, with whose executors the complainants have had a settlement, and have been satisfied by them one third part of the balance due on the said sums for principal and interest, the remaining two-thirds being still due. The complainant, *John*, is the administrator *de bonis non* of the first named *Richard* and *Elizabeth Orme*. The bill was filed against *John Snowden*, and the executors of *Samuel* and *Thomas Snowden*. The answer of the executors of *Samuel* states the payment made by *Thomas Snowden*, in behalf of the company, to the complainant, *John*, in 1794, of £457 18 3, and his taking the complainants' receipt in full of all claims. That after this the company settled their accounts, under the impression that the debt had been fully paid, and distributed the partnership effects, and insisted that this ought to be conclusive. *John Snowden* having also died, a bill of revivor was filed against his administrators. On the coming in of the answers of the several defendants, a commission issued to take testimony, which was taken and returned. The auditor being directed to state an account, reported one charging the defendants with balances due on the books of the company, viz.

1773, June 24th, Due to *Richard Snowden*,	97 77
1778, April 18, Due to ditto,	749 81
1783, Dec. 24, Due to *Elizabeth Orme*,	574 06
1794, Feb. 1, Interest on the above sums from the respective dates above mentioned,	1059 05
	$2280 69
1794, Feb. 1, Crediting a payment of	$1221 10
Leaving a balance of	1059 59
	$2280 69
1806, Feb. 1, Charging the balance due,	1059 59
Interest from the 1st of Feb. 1794,	762 91
	$1822 50

Crediting so much paid by *T. Snowden's* executors for their one-third part,	607 50
Balance due from the other defendants,	$1215 00

Kilty, Chancellor, (September Term 1816.) The proceedings will show the decree to account, by consent. A report has been made by the auditor under that decree, to which exceptions have been filed, but they go chiefly to the equity reserved on the decree.

In the case of *Dixon vs. Parkes*, 1 *Esp. Rep* 110, cited by the counsel of the defendants, Lord *Kenyon* ruled that the plaintiff could not, in the then form of action, recover the interest, having received the principal. But the reason given is more technical than just, to wit, that there must be something to support the interest given in the form of damages, and that there could be no verdict for the principal, that having been paid.

I am not satisfied, from any decisions in courts of equity, that when an account of personal estate is demanded, and payment of a book account, this rule has been or ought to be adopted, unless the evidence showed a receipt of the amount of the principal in full, with an intention or agreement to give up the interest. And there is no such evidence in this case. The account stated by the auditor appears to have been made out according to the usual course of the court. And it has not been shown to be otherwise, supposing the objections, on account of the rule of law, not to prevail.

The balance is claimed from the defendants, the executors of *S. Snowden*, and the administrators of *J. Snowden*, equally. *Decreed*, that the administrators of *J. Snowden* pay to the complainants $607 50, with interest thereon from the 1st of February 1806. And that the executors of *S. Snowden* pay to the complainants a similar sum, with interest as above. Assets in their hands being admitted. That the other defendants, executors of *T. Snowden*, be hence dismissed. From this decree the administrators of *J. Snowden* appealed to this court.

The cause was argued before Buchanan, Earle, Johnson, Martin, and Dorsey, J.

Magruder and *Ridout*, for the Appellants. The question is, Whether the complainants are entitled to interest on a sum of money, the principal being paid as early as 1794? They cited *Proctor vs. Cooper*, *Prec in Chan.* 116. *Waring vs. Cunliffe*, 1 *Ves. jr.* 99. *Brown vs. Barkham*, 1 *P. Wms.* 652. *Trelawney vs. Thomas*, 1 *H. Blk. Rep.* 303. *Blaney vs Hendrick*, 3 *Wils.* 206. *Dixon vs Parkes*, 1 *Esp. Rep.* 110. *Tillotson vs. Preston*, 3 *Johns. Rep.*

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229. *Parker vs. Hutchinson*, 3 *Ves.* 135; and *Upton vs. Ferrers*, 5 *Ves.* 803.

Marine Bank vs Biays.

No Counsel appeared for the Appellees.

DECREE AFFIRMED.

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THE MARINE BANK OF BALTIMORE VS. BIAYS.

In an action against an incorporated bank, the writ described the defendants by their corporate name of, *The President and Directors of the Marine Bank of Baltimore.* The declaration is against *the said Marine Bank*; the plea was, that the *Marine Bank* did not assume, and the verdict and judgment used the corporate name—*Held*, on objections made to the declaration, that it was sufficient.

J B being indebted to the *M. Bank*, for loans of money to the amount of 7900 dollars, and being the owner of 380 shares of stock in that bank, upon which all payments previously required by the bank had been made to the amount of $7600, did at the request of the bank empower H W, the president, to transfer the 380 shares, who made the transfer to himself, in trust for the bank, to secure the payment of the above $7900, and interest due thereon. The bank, agreeably to their charter, afterwards called on the stockholders to pay an instalment of $5 on each share of stock by the 1st of April 1811, which instalment J B failed to pay. H W on the 27th of March 1812, by direction of J B, transferred the 380 shares to N S, and J B then paid the bank the $7900 with all interest then due. The bank declared two dividends between the 1st of April 1811, and the 27th of March 1812. To recover the amount of these dividends J B brought an action of *assumpsit* against the bank—*Held*, that J B, by his neglect to pay the said instalment of $5, forfeited his claim to the two dividends declared by the bank, and that he had no right to sustain the action.

APPEAL from *Baltimore* County Court. *Assumpsit* for money paid, laid out and expended; for money lent and advanced, and on an *insimul computassent*. In the writ of summons which issued, the defendants, (now appellants,) are named *The President and Directors of the Marine Bank of Baltimore.* To this writ they appeared and imparled, &c. In the declaration it is stated, "that whereas the said *Marine Bank* on," &c. and that the money was paid and lent, &c. at *its* special instance and request; and the defendants named the *said Marine Bank*, or the *said Bank*, throughout the declaration. In the other parts of the record, they are named as in the summons. The general issue was pleaded, that the said *Marine Bank* did not assume upon itself, &c. And at the trial the plaintiff, (the appellee,) proved, that he, being indebted to the *Marine Bank of Baltimore*, the defendants, for loans of money previously made to him upon the promissory notes of *G. Stiles*, endorsed by him the plaintiff, to the amount of $7900, and being the owner of 380 shares of the stock of the said bank, upon which he had made all payments previously required by the bank to the amount of $7600, did at the request of the defendants, on the 8th of February 1811, execute and deliver a power of attorney to *H. Waters*, the president of the bank, authorizing and empowering him, for him the plaintiff, and in his name, to assign and transfer the said 380 shares of stock, standing in his name on the books of the said bank. He also proved that *Waters* afterwards, on the 14th of February 1811, did in pursuance of this power of attorney, and agreeably to the by-laws and rules of the bank, transfer on the books of the bank the 380 shares of the stock to himself, in trust for the defendants; it being understood, that the transfer was intended to secure the payment of the said loans, and interest due thereon, and that upon the payment thereof the said stock was to be transferred back to the plaintiff. He further proved, that the directors of the bank did, according to the act of assembly incorporating the stockholders thereof, and in conformity to the provisions of that law,

call on the stockholders to pay an instalment of $5 on each share of stock at the bank, on or before the 1st of April 1811, and that the plaintiff failed to make regular payment of the instalment so called for; and that *Waters* did, on the 27th of March 1812, by the direction of the plaintiff, transfer the said shares to *N. Stansbury*, on which day the plaintiff did pay to the defendants the said sum of $7900, with all interest due thereon. He also proved that the bank declared two dividends after the 1st of April 1811, and before the 27th of March 1812. The defendants then moved the court to direct the jury, that if they believed this evidence, the plaintiff was not entitled to recover any dividends made by the bank after the 1st of April 1811, and before the 27th of March 1812, the same having been forfeited by reason of the nonpayment of the instalment required to be paid. This direction the Court, [*Bland*, A. J.] refused to give, and the defendants excepted; and the verdict and judgment being against them, they appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, EARLE, JOHNSON, and MARTIN, J.

Martin (Attorney-General,) for the Appellants. 1. The bank was incorporated by the name of *The President and Directors of the Marine Bank of Baltimore*, and the suit is properly brought against them by their corporate name; but the declaration is against *the said Marine Bank*, which is not the corporate name of the defendants. The plea is, that the *Marine Bank* did not assume, and the verdict is, that the President and Directors, &c. did assume, and the judgment accordingly. There is no such corporation as the *Marine Bank*, and "*the said Marine Bank*" cannot mean *The President and Directors of the Marine Bank of Baltimore*. The making up the issue cannot aid the plaintiff, if the issue tendered was an improper one. Nor can the verdict cure the defect. There is, therefore, no declaration against the defendants. 2. It does not appear that any dividends were made of the stock in question. 3. The forfeiture of dividends was intended to secure the punctual payment, by the stockholders, of the instalments, as they were called for. The bank had no interest to pay up the instalment on the plaintiff's stock, because he was personally liable. The payment of the instalment was not necessary to keep the stock in existence; it was only intended to secure the future dividends. 4. The bank had no money belonging to the plaintiff out of which the instalment could have been paid. 5. These shares of stock were not entitled to dividends, because when the instalments were not paid, the law says no dividends shall be declared on them. 6. If the legal title to the shares was in the bank, how could the plaintiff claim dividends? If the plaintiff was the owner of the stock for the purpose of receiving the dividends,

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he was the person who should have paid the instalment when the call was made.

Winder, *Williams* and *R. Johnson*, for the Appellee. With respect to the alleged defect in the declaration it is now too late, admitting it to exist, to take advantage of it. It should have been pleaded in abatement. 5 *Com. Dig.* (2 B, 2) 569. *Mayor, &c. vs. Bolton*, 1 *Bos. & Pull.* 40. The defendants are properly named in the summons which issued against them, they came voluntarily into court, and were declared against as the *said Marine Bank*, which is a part of their corporate name, and the word *said*, couples that part with the rest of the name. The declaration draws with it the writ, which it is supposed to recite. It is enough that the whole name is once expressed, it being afterwards as completely comprehended by the relative expression *said*, as if it were repeated over. It is the same as where in ordinary cases the surname is omitted and the christian one only used Sometimes only one of many christian names is used, and sometimes the relation of the party to the suit is merely stated as *defendant* or *plaintiff*. 1 *Chitty's Plead.* 248. *Conner vs. Conner*, 2 *Wils.* 386. By pleading to the declaration, the defendant admits it to be good, as well as the writ. 5 *Bac. Ab.* tit. *Pleas.* &c. (A) 528. They also referred to 1 *Kyd on Corporations*, 283, 285, 286, 287, 288. But the defect, if any, is cured by the verdict. *Harvey vs. Peake*, 8 *Burr.* 1793. *Palmer vs. Stavely*, 1 *Ld. Raym.* 669.

The facts in the case are in favour of the plaintiff below. When the instalment was called for the plaintiff was not the legal holder of the stock, but the right was in the bank, who ought to have paid the instalment. Suppose all the stockholders had made default, yet dividends must have been made amongst them. Here the stock was held by the bank, and it could not be forfeited. The bank is considered as an ordinary mortgagee. When mortgagees are in possession of the mortgaged premises or articles, they are bound to pay taxes, keep them in essential repairs, and, if it be living property, to afford it nourishment. 5 *Bac. Ab.* tit. *Mortgage*, (C) 20. (F) 103, 107. Still more are they bound to do that which will prevent a forfeiture of ordinary property. And even if the expenses incurred to preserve the property do not increase its value, justice and equity require they should be advanced, and the same may be charged to the mortgagors. *Abbott on Shipping*, 19, 20. *Jackson vs. Vernon*, 1 *H. Blk. Rep.* 114. *Westerdall vs. Dale*, 7 *T. R.* 308. *Hodgson vs. Butts*, 3 *Cranch*, 144, 2 *Fonbl.* 354. *Newall vs. Wright*, 3 *Mass. Rep.* 138. Here, however, the mortgaged article was enhanced in value exactly to the extent in which the advances would have been made. It increased the capital just so much; of course the property mortgaged remained of equal value to secure the mortgaged debt. If the stock was an adequate security when taken, it did not become less so by such an

increase of the mortgaged debt, as the advances would have caused, since the mortgaged article was equally increased in value. It remained as it was when taken, sufficient to secure the payment of the debt and of the advance; and the interest also was more than guaranteed by the dividends on the advance, the dividends being more than 6 pr. cent.

This call of an instalment, which it is pretended was not paid by the plaintiff, and that thereby dividends were forfeited, was a forfeiture made by the defendants themselves. They were the *legal owners* of the stock, and of course ought to have paid the instalment. The plaintiff had no right, and was clearly under no obligation to meddle in the matter. Could a mortgagee cause himself a forfeiture in his own behalf against the mortgagor? He certainly could not. 5 *Bac. Ab.* tit. *Mortgage*, (F) 103. Here the bank could not be deficient to itself. It is a mere omission to make the entries in their books. Such a clerical omission is not to cause important legal consequences. The plaintiff could not control those entries. It was extremely unjustifiable and immoral, and believed to be wholly illegal, that the bank should, by a trick, in omitting to make two entries in its books, not only cause such a loss to the mortgagor, but thereby gain the whole of that loss to themselves. Thus converting their own criminal and dishonest conduct into a profit to themselves, and producing a correspondent loss to their mortgagor. This action for money had and received, is an equitable action; and it is evident that the bank, by the forfeiture, received more than their mortgaged debt. It cannot be said that no dividends were made on the stock in question, for the bill of exceptions admits that dividends were made. And it is also said the dividends were forfeited, which necessarily admits their having existed. The act of incorporation does not say there shall be no dividends, but only that such dividends shall not be paid over. 1810, *ch.* 66, s. 8. Suppose an instalment is called for on the 1st of May, and a dividend to be declared on the 15th of May, and there is a forfeiture, can it be said that the whole dividend is forfeited? No, it is not to be paid to the person making default. Suppose he pays on the 17th of May, then the dividend is to be calculated so as to omit the two days. What is done with the dividend during the forfeiture? Is it paid away to the rest of the stockholders?

Martin, (Attorney-General,) in reply. There is no doubt that a person sued by his right name, may be declared against by his christian or surname. But it it is denied that the defendants have either a christian or surname. There is no objections to the use of pronouns, but here the pronoun *it* has been used, and why so used is inconceivable. How can *the said Marine Bank*, by any construction mean *The President and Directors of the Marine Bank of Baltimore?* Can the pronoun *it* relate to *The President and Directors*, &c.? The plea and issue thereon joined is, that

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the *said Marine Bank* did not assume, and the verdict is that *The President and Directors*, &c. did assume. If the plaintiff was divested of all interest, both legal and equitable in the stock, how can he make this demand? He had either transferred away all his interest, or he was bound to pay the instalment. The bank had no more interest than the plaintiff had. The object for calling for an instalment was to bring money into the bank; and the bank could make no entry on their books so as to comply with the call. The plaintiff had no funds in the bank to meet the call. It could not be complied with by him, or by any one for him, except by bringing the instalment into the bank. What is the instalment? It is part of the consideration money which the plaintiff owed for the stock. Unless the instalment was paid, nothing was yielded by the payment of the preceding instalments to benefit any one. There was a general power given by the plaintiff to *Waters* to transfer the stock, and he did transfer it to himself, in trust for the bank, without any thing to shew that it was for the benefit of the plaintiff, or in trust for him. Nothing remained in the plaintiff to entitle him to any dividend; but if he was entitled to the dividends, he was bound to pay the instalment. Neither the plaintiff, nor the bank, had the legal title in the stock—it was in *Waters*, and no default is chargeable to the bank. The stock was transferred to *Waters*, in trust for the payment of the debt due from the plaintiff to the bank, and after such payment, it was a resulting trust for the plaintiff. Suppose the bank had paid the instalment, had they any security to compel the plaintiff to refund? They certainly had none. If this is admitted, then it is admitting that the plaintiff ought to have paid the instalment. The bank could not call upon the plaintiff, unless he was bound to pay. If a mortgagee pays money for the mortgagor, it is upon the principle that the mortgagor ought to have paid it, but if he pays when the mortgagor was not answerable, then he cannot call on the mortgagor for the money paid. If a mortgagor owing a part of the purchase money for the land, mortgages it, the mortgagee is not bound to pay the debt. He may do so for the purpose of securing his own debt. A mortgagee is not bound to comply with the mortgagor's engagements, if he does it, it is because he has his remedy over. What are the expenditures which a mortgagee in possession is obliged to incur? He is not obliged to lay out more money than is sufficient to keep the premises in necessary repairs. He is not bound to enhance the value of the premises. Here the bank was not bound to pay the instalment so as to enhance the value of the stock. The plaintiff was as much in *possession* of the stock after as he was before the transfer. It was no more than the executing a mortgage without changing the possession. Payment by the bank would have been increasing a fund to pay the plaintiff's debt. He knew he owed for the stock any instalment that might be called. Suppose the stock was only equal to the payment of the

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bank debt, and the bank had paid the instalment, and it had turned out that the dividend was only a small *per cent.* and the price of stock had fallen, it would be so much lost to the bank. It was a risk the bank did not choose to run. The plaintiff could receive no dividend but such as accrued after the payment was made good, by calculating from the time when the payment was made. All profit made upon the stock of the bank is divided among the stockholders. If there is any forfeiture by not complying with calls for instalments, the profit on the stock forfeited goes into the general fund, and although the person who forfeits receives no dividend, yet that profit is divided among all the other stockholders who do comply with the calls of the bank. If the whole profits are not divided, (as it often happens that a surplus is reserved,) then it goes into the general fund, to be divided at a future day amongst all the stockholders who may have complied with the calls of the bank up to that day.

Chase, Ch, J. delivered the opinion of the court. After stating the case, he proceeded as follows. The court are of opinion, that the 380 shares of stock were deposited in the hands of the defendants below as a pledge to secure the payment of the loan made to the plaintiff, with interest, and that the defendants had no right to appropriate the pledge, or any part thereof, without the consent and by the direction of the plaintiff, to any use or purpose; and that the plaintiff had no power of disposition of the shares until the loan, with interest, was satisfied, without the concurrence of the defendants, because thereby the security would have been diminished. That the defendants had no money in their hands, belonging to the plaintiff. to pay the instalment, and were under no obligation to advance money for him, and thereby increase the debt due to the bank from him. And if the defendants considered the shares so pledged as amply sufficient to secure the debt, it was not compatible with their duty as trustees, for the stockholders to divert the funds of the bank from their ordinary and legal appropriation, to pay the instalment due from the plaintiff, and thereby free him from the penalty he would have incurred by not complying with the call, which the interest of the bank had rendered necessary. And such conduct in the defendants would have made that provision of the law nugatory as to the plaintiff, which was intended to secure punctuality in the payment of instalments, and the interest of the other stockholders would have been diminished, by such improper interference, to the amount of the dividends on the said stock, which became a part of the common funds of the bank, and the defendants would have been justly chargeable with partiality in such application of the funds.

If the sufficiency of the pledge had been doubtful, prudence and sound discretion would have dictated the pro-

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priety of the payment by the bank to render the debt secure.

The court are of opinion, that the plaintiff, by his refusal or neglect to pay the instalment of $5 on each share of stock thus pledged, forfeited his claim to the two dividends declared by the defendants, and that he had no right to sustain the action in this case.

The court do not consider that the objections raised to the declaration are sustainable.

JOHNSON, J. having stated the facts, thus proceeded—Whether or not the court below erred in the opinion given by them, is now for the consideration of this court.

The action for *money had and received* will be sustained if the plaintiff has an equitable right to the money; and the case must rest and depend on the same principles that would govern the decision if the cause was now before a court of equity.

Before I proceed to the examination of those principles that ought, in my opinion, to govern the cause, let us take a view of the relative situation of the parties.

The bank, aware of the call it had made on the stockholders for payments, receive the stock in question. Over it the bank acquired the *legal interest*, backed with an *equitable right* to the extent of the debt due. The money paid on that stock, even without the additional responsibility of the plaintiff, as the endorser of the notes, together with that of the drawer, was an ample, and more than ample security for the debt. The sum paid on the stock was only $300 less than the debt itself, and the stock itself, as it then stood, worth more than the sum due. The dividends on the stock in its then situation, would have exceeded the interest on the debt more than $130—the one limited to six, and the other never dividing less than eight *per centum*.

When those parties were thus situated, was it equitable or just for the bank to receive the stock, with an intention to demand $1900 more to be paid thereon, and in case of failure to claim all the profits such stock would otherwise have drawn? Is it consistent with equity or justice, and in a court of chancery could such a demand be set up under any *pretext or denomination whatever?* I cannot for a moment believe that in that court, whose power it is to *relieve from*, and *not enforce forfeitures*, that such a question would bear a moment's consideration.

The object of the clause in the act of incorporation, on which the plaintiff's demand is resisted, most unquestionably was to draw more money into the bank to meet its engagements, or to further its operations; and no one could question its right to detain, from the delinquent stockholders, the dividends, and either keep them in the vaults of the bank, or divide them immediately amongst the punctual stockholders, as they conceived most advantageous for the institution, when there was no *other connexion than that of a mere naked stockholder*. But it will not follow

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that the same consequences are to result when the connexion of the bank with the stock is more intimate. If the bank had obtained the equitable as well as legal right to the stock in question, then, as to the bank, and as to all who were interested in the institution, this stock would have drawn the *same interest, whether the instalments called for were paid or not;* for as the bank, as such, has no funds, and only uses those of the stockholders, if money had been paid on those shares, it must have been the money of the stockholders remaining in the bank—a surplus fund undivided; and, therefore, when the dividends were struck, the stockholders would receive the same sum, either as their interest in the stock thus increased, and less out of the surplus fund, or more out of that fund, and less on account of the stock. A payment, therefore, on stock owned by the bank, could add nothing to its funds—it would bring no money into the bank. The simple operation would be to give a different destination to that which was already there.

But it is urged that here the bank had not an absolute interest in this stock; certainly such is the fact; for if it had an absolute indefeasible interest, then this suit never could have been conceived, as the plaintiff would have had no part or lot in the matter. But the bank had the legal, and to a large extent, the equitable interest also; and yet we are told, and I may say only told, that the bank, the mortgagee of this stock, was not bound to do those acts, if any were to be done, to keep the stock (if I may so express myself,) in full existence, and not suffer it, as to the interest of the mortgagor, to be completely prostrated. Now let it for a moment, for argument sake, be admitted, that the bank was not *bound* to make the payments; yet it cannot be controverted by any one the least conversant with the principles by which a court of chancery is governed, that if *ex gratia*, the payments had been made, the dividends in question must have been accounted for to the mortgagor, either by applying them to sink the debt, or by a payment over, that being discharged. But we have already seen that such a payment could not have added to or diminished in the slightest degree the interest of the institution. By the act of incorporation the stock is to be transferred on the books—those books, and those alone, will then disclose the stockholders. At the time when the money in question was called to be paid, the bank, by its president, was the holder. Now let it be yielded, that the officers of the bank would have received the payment if the plaintiff had offered the money, yet, if received, it must have been received as if paid by the president, and added to the increase of the stock. The name, or the agency of the plaintiff, could not have appeared in the transaction. If then the payment must appear (if it had been made,) to have been made by the president of the bank, is it, on principles of equity and justice, certain that he

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was bound to have caused such entries to be made as would have kept the stock in full power?

It has already been established to my comprehension, that an actual payment of money out of the surplus funds, or an entry made on the books, purporting that the payment was made, could not have affected the interest of those concerned in the institution. It remains to be considered, whether, if the one or the other was necessary to keep the stock in active operation, the defendants were not bound so to have done? And if they were, then it must be conceded, they have no right to retain the money in consequence of their own neglect or fault.

The able counsel who conducts this case on the part of the bank, as is usual with him, when he cannot bring books to support the principles he contends for, concedes those brought to bear against him, but draws out of his own fertile imagination nice distinctions, just suited to cover his case.

It is unquestionably established that a mortgagee in possession, is bound to do those acts, to keep the premises fit for a beneficial use; and that if he makes no profits, from neglecting to do so, he must account as if he had. 5 *Bac. Ab. tit. Mortgage*, (F) 104. It is also clear that he is bound to perform all covenants running with the thing mortgaged; that he is bound to do all acts that are necessary to prevent the mortgaged premises from being forfeited. *Pow. on Mort.* 264, 266.

But it is said those principles have no bearing on the case. To my mind each and every of them sanctions the plaintiff's right to recover the money in question.

If the mortgagee is compelled to repair, to keep the mortgaged property fit for use, which can only be done by incurring expense, *a fortiori*, (if it be necessary,) were the defendants bound to make the payment, or entries; for neither the one nor the other could in the slightest degree have diminished the interest or dividends of the stockholders. If the mortgagee is bound to comply with the covenants running with the mortgaged premises, then, as the demand in question was bottomed on the *covenant* that the stock should cease to divide in case the demand was not met, *which runs with the stock*, the mortgagee was bound to have met it, to have avoided such forfeiture.

But it is contended that the demand was not founded on a covenant connected with the stock itself, but that the sums called for were part of the original purchase money. The reverse is the case; for if the demand was founded on a debt due from the plaintiff at the time he became a stockholder, then, it would follow, that the noncompliance with the call, would subject him to a suit for the money; and yet, it is apprehended, that none who question the decision of the court below, will go to the extent that he might have been sued for the money. This remark answers also the argument on the part of the appellants, that a subsequent mortgagee is not bound, before he can resort to the

mortgaged premises, to discharge the prior mortgage, supposing such an argument to have the least applicability to the case before the court. But it seems to me to have no bearing; for, in no instance could the subsequent mortgagee resort to the property until such prior mortgage was discharged, or unless it was adequate to both, and then no contest could exist.

That the claim for a forfeiture on the noncompliance with the call, is evidently founded on a covenant running with the stock, appears from its resting on the terms of the law under which the stock is taken—each party agreeing to those terms. If such a clause had not been inserted in the law, then no demand could have been made, producing such an effect. The principle, that the mortgagee in possession is bound to do all acts to prevent a forfeiture, powerfully bears on the present case; for, if the mortgagee of leasehold property is bound to pay the rent to avoid a forfeiture to a stranger, which requires the *advance* of money on his part, how much more strong is the case here against the mortgagee, where no money need have been advanced, and when he himself claims such forfeiture?

But it is urged that the case before the court is not to be governed by those principles that apply to mortgagees in possession. For it is said, if the mere act of executing a mortgage makes a mortgagee in possession, then all mortgagees are mortgagees in possession. But as a distinction exists between them, therefore the merely executing a mortgage can have no such effect. No person can suppose the mortgage itself constitutes a mortgagee in possession. But the case before the court never could have existed if the bank had not been in possession, possessing such property as the property in question, in the way, and only way, it could be possessed—receiving all the profits immediately as they became due.

But it has been observed, that the stock was not transferred to the bank, but to *H. Waters*, and that supposing if it had been transferred to the bank, on the facts in the cause, the dividends could not have been withheld; yet that circumstance varies the case. It does not appear to me in any manner to alter the question; for as he was the president and agent of the bank, it must be affected by his conduct, and I know of no other way of transferring to the bank, except through the instrumentality of the president thereof.

Against the plaintiff's demand it is also urged that the defendants are not liable, because the dividends in question have been distributed amongst the stockholders. This ground is as defenceless, in my opinion, as those already considered. If tenable in this case, it must in all cases prevent any money from being received, no matter how unjustly it was detained, provided they have paid it away. By the charter the bank is to be sued in the name of the president and directors—the stockholders are not liable to be sued as such for the conduct of the bank, and they can

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only be come at through the president and directors. If by the injustice of the president and directors, or by the misconception of the rights of the stockholders, they pay away to one or more, more money than he or they were entitled to receive, the president and directors are liable to the person injured, whose money was thus unjustly paid away, whether the same proceeded from the purest or most unworthy motives; and their remedy is against the stockholders—a remedy in their own hands; for if compelled to pay, as in this case, there will remain, to the extent of the recovery, less to be distributed.

JUDGMENT REVERSED.

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A witness is bound to answer a question touching the issue in an action at law, in which he is not a party, although it may establish, or tend to establish, that he owes a debt, or otherwise may subject him to a civil suit, or a bill in chancery. He is not obliged to answer questions which may subject him to a criminal prosecution, or to a penalty.

APPEAL from *Frederick* County Court. This was an action of trover for a bill obligatory, the property of *H. Darnall*, in his life-time, and alleged to have been converted by the defendant, (the appellee,) after the death of *Darnall*. The declaration stated it to have been a bill obligatory made by the defendant and *David Kemp*. The general issue was pleaded; and at the trial it was admitted by the parties that *Darnall* died several years before the suit was brought, and that the plaintiff is his administrator, and had letters as such duly granted to him, more than a year before the institution of the suit. The plaintiff then produced and swore as a witness, *David Kemp*, the person named in the declaration as one of the co-obligors in the said bill obligatory; and after having proved that due notice to produce the bill had been given to the defendant, asked *Kemp* this question—Do you or do you not know whether the defendant, before the 29th of December 1814 obtained possession from a certain *B. Darnall*, of the bill obligatory, by which the defendant and yourself had become bound to pay to *H. Darnall*, in his life-time, the sum of £225 current money? The witness refused to answer the question, alleging that his answer might establish, or tend to establish, that he owed a debt, or might otherwise subject him to a civil suit, or a bill in chancery. The plaintiff then prayed the opinion and direction of the court, that the witness was bound to answer the question. But the Court [*Buchanan*, Ch. J. and *Shriver*, A. J.] were of opinion that he was not bound to answer it; and the witness refused to answer it. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before EARLE, JOHNSON, MARTIN, and DORSEY, J.

Taney, the Appellant, in *propria persona*, insisted, 1. That the answer in the affirmative to the question would

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not have subjected the witness to a civil suit. 2. That if the answer would have subjected him to a civil suit, yet the plaintiff had a right to the benefit thereof.

1. This being a case of tort, if the plaintiff below had recovered judgment against the defendant, the defendant could not have compelled the witness to contribute a moiety of the damages. *Merryweather vs. Nixan*, 8 *T. R.* 186 The witness, therefore, could have no interest. *Norwood vs. Norwood*, 3 *Harr. & Johns.* 57, it is true, is a case where in a joint action against them in ejectment, a recovery was had, and one of the defendants having paid all the costs, recovered a moiety against the other; but that case is distinguishable from the present. The plaintiff in this action could not, on the answer of the witness in the affirmative, recover against him, nor could he be sued by the defendant. His answer would not have been proof of the execution of the bond if there had been no subscribing witness to it. His answering the question would not have placed him in a worse situation than he was without answering.

2. But conceding the witness had an interest, he was bound to answer the question. 1 *Phill. Evid.* 208, referring to 1 *Hall's Law Journal*, 223, where, on a question referred to the twelve judges in *England* by the House of Lords, eight of the judges and the Lord Chancellor, the others dissenting, held that the witness was bound to answer a question, although his answer might render him liable to a civil action.

T. C. Worthington, for the Appellee. If the witness had answered in the affirmative to the question put by the plaintiff, it would have established the fact of the defendant having come wrongfully into the possession of the bill obligatory, and the witness being privy to it, he is to be considered a *tort feasor*; and in the event of a recovery against the defendant, the latter would be entitled to recover half the damages against the witness. That one *tort feasor* may recover a proportion of the damages against another, was decided in this court in *Norwood vs. Norwood*, 3 *Harr. & Johns.* 57. If this be correct, the witness was interested, and he is not bound to answer any question, which may subject him to a civil action. *Title vs. Grevett*, 2 *Ld. Raym.* 1008. *Peake's Evid.* 184 If the verdict can be used in evidence against the witness, in case the party for whom he is called as a witness should fail in the action, or if the defendant in this case can use it in any way against him, then has the witness such an interest as will render him incompetent. 1 *Phill. Evid.* 43. The opinions of the twelve judges of *England*, on the question referred to them by the House of Lords on the impeachment of Lord *Melville*, were so contradictory, that a declaratory law was found necessary to settle the point *(a.)*

(a) The statute of 46 *Geo. III, ch.* 37. See 2 *Starke's Evid.* 135.

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The only adjudicated cases previously to this declaratory statute, was in favour of the privilege of the witness.

DORSEY. J. delivered the opinion of the court. The question arising in the bill of exceptions in this case is, Shall a witness be compelled, in a court of law, to answer a question touching the issue in the cause, where such answer may expose him to a civil action? It is well established, that a witness shall not be obliged to answer questions which may subject him to a criminal prosecution; or to a penalty, or to a forfeiture. But whether a witness shall be excused from answering questions, which might affect his pecuniary interest, is a point upon which difference of opinion has prevailed. It is believed that the course of justice would be greatly obstructed by permitting the witness to shelter himself under this plea. If the witness has a knowledge of facts, in the establishment of which, parties to a suit are interested, is it not highly just and convenient, and does not the due administration of justice require, that the witness should disclose his knowledge of the fact in controversy? It is true, that the witness, by disclosing such fact, may expose himself to a civil suit, and thereby be compelled to do justice to his creditor. And shall *this consequence*, so consonant to all just and moral principles, excuse the witness from giving testimony on an issue between other parties, and in which he has no interest?

The witness, on a bill filed in the court of chancery against him by his creditor, for a discovery in aid of the jurisdiction of a court of common law, could be compelled to disclose the same facts, which he is called on to disclose as a witness.

If the witness, therefore, can be compelled in chancery, at the instance of his creditor, to make the disclosure, why should he not be compelled in a court of law to answer the same question between other parties?

The witness claims an exemption on the ground that he is not obliged to answer questions which may affect his interest We have seen that he is bound, at the instance of his creditor, to answer such questions. The defence, therefore, can not be maintained. The court are of opinion, that the court below erred, and therefore reverse their judgment.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

ALLSTAN'S Adm'r. vs. CONTEE'S Ex'r. 1818.

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The assignee of a debt, resting on an open account, may under certain circumstances support an action of *assumpsit* thereon in his own name against the debtor. As where T C was indebted to J and C on open account, and C transferred his interest therein to J, who gave notice thereof to H, and he assumed payment thereof to J

Where there were facts and circumstances sufficient to be left to the jury for them to decide whether or not the defendant had promised to pay the plaintiff the claim sued for.

A having two claims against B on open account, B makes payment of a sum of money on account, without specially applying it to either claim It is to be applied to the claim prior in point of date

Where the court held that the evidence offered took the case out of the act of limitations.

ERROR to *Frederick* County Court. This was an action of *assumpsit*, brought on the 23d of July 1812, by the surviving partner of *J.* and *C. Allstan*, (whose administrator the plaintiff in error is,) against the executor of the surviving partner of *T.* and *A. Contee*, (the defendant in error.) The declaration contained *five* counts. The *first* for articles properly chargeable in account. The *second* for money laid out, expended and paid. The *third* for money had and received. The *fourth* for money lent and advanced; and the *fifth* on an *insimul computassent* in the life-time of *T.* and *A. Contee*, &c. The defendant pleaded the general issue, and the act of limitations.

1. At the trial the plaintiff read in evidence the deposition of *Thomas Johnson*, taken by consent, who deposed, "that he was well acquainted with the firm of *J. Allstan* and *Brothers*, and that the firm of *T.* and *A. Contee* dealt extensively with them; that on the dissolution of the partnership of *J. Allstan* and *Brothers*, *J.* and *C. Allstan* took the balances of the former concern upon themselves, by the consent of the parties, and became responsible for their debts. That he was acquainted with *T.* and *A. Contee*, for many years; that they were partners in business and trade under the firm of *T.* and *A. Contee*, and had extensive dealings with the house of *J.* and *C. Allstan*. That he was in habits of intimacy with *J.* and *C. Allstan*, and knowing they were largely in advance for *T.* and *A. Contee*, he advised them to make out their accounts and have a settlement. That he saw these accounts after they were made and delivered to *A. Contee*, in *Contee's* possession in February 1807. That he at that time asked *A. Contee* to give him a draft on the house of *J.* and *C. Allstan* for a small sum due him from said *Contee*, as he (the witness,) knew they were the agents and correspondents of the *Contees*, but he refused to give the draft, saying and taking up the accounts of the *Allstans*, that *T.* and *A. Contee* owed those gentlemen upwards of, or between 9 and 10,000 dollars. That he has heard *A. Contee* say that there was due to the house of *J.* and *C. Allstan* more than $4000, for losses of shipments of tobacco made by *J.* and *C. Allstan* on account of *T.* and *A. Contee*. That it is the usage and custom of merchants, who credit for shipments of tobacco, to charge interest from the time of the credit, on the difference, if the proceeds of sale do not amount to so much as is credited or advanced. That *A. Contee* said the shipment was made to *Bremen*, and that they lost more than $4000 on it, being the difference between the net proceeds of sales of the tobacco, and the amount advanced or credited on the shipment to *T* and *A. Contee* by the *Allstans*. That it is the usage and custom of trade in *Baltimore* between merchants, to charge interest on their advances, and credit interest on payments made to them. The plaintiff

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further gave in evidence, that *A. Contee* died in the lifetime of his father, and partner, *T. Contee*, in February 1810, and that *T. Contee* survived him, and died in January 1811. The defendant was admitted to be his executor. He further gave in evidence, that the firm of *J.* and *C. Allstan* delivered their account current in 1807 to *A. Contee*, of the firm of *T.* and *A. Contee*, and that *A. Contee*, whilst the said account was in his possession in 1807, acknowledged that *T.* and *A Contee* were indebted to the firm of *J* and *C. Allstan* in the sum of between 9 and 10,000 dollars. He also proved that *C. Allstan*, of the house of *J.* and *C. Allstan*, died in April 1812. He then produced and read in evidence sundry letters admitted to have been written, some of them by *T. Contee*, and the others by *A. Contee*, to *J.* and *C. Allstan*, acknowledging themselves indebted to *J.* and *C. Allstan*, and promising payment, making mention of accounts received but not examined, &c. These letters are dated 16th of April 1802, 27th of May 1806, 20th and 28th of April 1807, 16th of July 1807, 18th of August 1807, 15th and 29th December 1807, 2d July 1809, 5th of January 1808, and the 14th of January 1810. The defendant then read in evidence the account filed by the plaintiff No. 1, it being the account declared upon in the first count of the plaintiff's declaration; and also the accounts produced by the defendant, No. 2, 3, 4 and 5. No. 1 is an account of *T.* and *A. Contee* with *J.* and *C. Allstan*, the first item in which, on the 5th of December 1803, is "To balance due *J. Allstan* and *Brothers*, $22,179 86," and stating a balance due on the 24th of August 1810, of $4479 50 for principal, and $2717 55 for interest, and charging afterwards in that account, on the 23d July 1810, "To the widow of *John Langs*, Son & Co. for loss on two shipments, &c. $4165 57, and charging cash paid for pork, $4 25, and charging interest on $4165 57. No. 2 is an account of *T.* and *A. Contee* with *J. Allstan* and *Brothers*, commencing in July 1803, and ending on the 3d of December 1803, charging a balance then due of $21,492 97. No. 3 is an account of *T.* and *A. Contee* with *J.* and *C. Allstan*, commencing on the 5th of December 1803, with a charge of "Balance as per account rendered $22,179 86." In this account is a credit on the 10th of December 1803, of "Cash received of *A. Contee*, $6400;" another credit on the 30th of July 1804, of "*T.* and *A. Contee's* adventure per ship General *Mercer* to *Bremen*, $15,352 15;" and also a credit on the 3d of August 1804, of "*T.* and *A. Contee's* adventure per ship *Nancy* to *Bremen*, $3505 92;" closing with a balance due on the 13th of August 1804 of $4464 32. No. 4 is an account of *T.* and *A. Contee* with *J.* and *C. Allstan*, commencing on the 13th of August 1804, with a charge of "amount of debts as per account rendered of this day, $35,279 71;" and crediting on the same day, "by amount of credits as per amount rendered of this date $11,957 33;" closing with a balance due on the 4th of September

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1804, of $9441 58. No. 5 is an account of *T.* and *A. Contee* with *J.* and *C. Allstan*, charging balance per account rendered in June 1804, of $9441 58, and closing on the 24th of August 1810, with a balance due of $13,909 26; which accounts, so produced by the defendant, were rendered by *J.* and *C. Allstan* to *T.* and *A. Contee*, and contain an entry in 1803, to the debit of *T.* and *A. Contee*, of $22,179 86, of a debt due to the former firm of *J. Allstan* and *Brothers*, then composed of *J. H.* and *C. Allstan*, of which firm *J.* and *H. Allstan* are still living. And the plaintiff offered the above evidence to prove that *T.* and *A. Contee* were in possession of the accounts of *J.* and *C. Allstan* by them rendered, containing the said debit, before and at the time they acknowledged the sum due from them to *J.* and *C. Allstan*, and promised payment thereof; and that in this action they were liable to be charged with the debt. The defendant then prayed the court to direct the jury, that in forming their verdict they are not to consider as a charge against the defendant, any balance originally due to *J. Allstan* and *Brothers*. And this opinion and direction the Court [*Shriver* and *Nelson*, A. J.] gave. The plaintiff excepted.

2. The plaintiff then prayed the opinion of the court to the jury, that if the jury find from the evidence that *J.* and *C. Allstan* had accounted with the firm of *J. Allstan* and *Brothers* for the sum due from *T.* and *A. Contee*, and that *T* and *A. Contee*, with a knowledge that *J.* and *C. Allstan* had settled said balance for them with *J. Allstan* and *Brothers*, promised to pay the same to *J.* and *C. Allstan*, and that the same was debited to them, with other transactions with *J.* and *C. Allstan*, with the consent of *T.* and *A. Contee*, that then the plaintiff is entitled to recover. Which opinion and direction the court refused to give to the jury; because, in their opinion, no evidence of the supposed facts stated in this prayer had been given to the jury. The plaintiff excepted.

3. The plaintiff then prayed the opinion of the court to the jury, that the testimony contained in the deposition of *T. Johnson*, and the letters of *T.* and *A. Contee*, and their respective promises to pay *J.* and *C. Allstan* the balance on their account stated, after *T.* and *A. Contee* had for a length of time been in the possession of the said account stated, containing the charge against them of the balance due to *Allstan* and *Brothers*, and the accounts read by the defendant to the jury, is competent and proper evidence to be left to the jury, to prove—1st. That *J.* and *C. Allstan* had accounted with the firm of *Allstan* and *Brothers* for the debt due them from *T.* and *A. Contee*. 2d. That *T.* and *A. Contee* had notice of such fact, and approved of it by their subsequent promises to pay the said balance to *J.* and *C. Allstan*; and prayed the court to be permitted to address the jury on the above evidence to establish those

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facts. This prayer also the court overruled. The plaintiff excepted.

4. The plaintiff then proved that the firm of *Allstan* and *Brothers* was dissolved on the 31st of December 1803, and the firm of *J.* and *C. Allstan* commenced on the 1st of January 1804. He then read the account produced by the defendant, containing a credit of $6,400, made by *A. Contee*, under the date of the 10th of December 1803, during the partnership of *Allstan* and *Brothers*, and before the partnership of *J.* and *C. Allstan*, and prayed the opinion of the court to the jury, that the same entry in the account filed by the plaintiff does not preclude or debar the jury from placing the said sum to the credit of the balance due *Allstan* and *Brothers* from *T.* and *A. Contee*, if the jury, from the whole evidence, should be of opinion that the said payment was made to *Allstan* and *Brothers* before the partnership of *J.* and *C. Allstan* had existence; and that the jury might rectify any error in said account, if in their judgment, on the whole evidence, any error existed either in the debits or credits. This opinion the Court, [*Shriver*, A. J.] also refused to give to the jury. The plaintiff excepted.

5. The plaintiff then proved by a witness, that he (the witness,) as the agent of *T.* and *A. Contee* in 1803, purchased large quantities of tobacco for them, which was, by their direction, in that year shipped to the house of *Allstan* and *Brothers*, and by them in that year received; that the witness purchased a part of the said tobacco by drafts of *T.* and *A. Contee* on the house of *Allstan* and *Brothers*. He then read in evidence the letter and accounts of Widow of *John Langs, Son*, & Co. The letter is dated *Bremen*, 22d of April 1805, addressed to *J.* and *C. Allstan*, giving an account of the sales of 50 hhds. of tobacco by the *Nancy* 4,318
And 205 by the General *Mercer* 17,936

R 22,254

The accounts of sales of the several hhds. of tobacco so shipped and the prices. The account of the sales of the 205 hhds. commenced on the 5th of October 1804, and ended on the 5th of March 1805, and amounted to R 25,969 37, and deducting the charges, &c. left a balance of R. 17,936 to the credit of *J.* and *C. Allstan*. The account of the sales of the 50 hhds. commenced on the 7th of December 1804, and ended on the 15th of February 1805, amounting to R. 6,342 10, and deducting for charges, &c. left due R. 4,318, to be credited to *J.* and *C. Allstan*. The defendant then read in evidence the accounts X and Z, rendered to *T.* and *A. Contee* by *J.* and *C. Allstan*, the first being an account of 205 hhds. tobacco shipped to *Varel* for account and risk of *T.* and *A. Contee*, per the ship General *Mercer*, and consigned to

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Widow of *John Langs*, *Son*, & Co. merchants, *Bremen*, the net proceeds after deducting charges, &c. amounting to $15,352 15; and the second an account of 50 hhds. of tobacco shipped to *Vance*, for account and risk of *T.* and *A. Contee*, per the ship *Nancy*, and consigned to Widow of *John Langs*, *Son* & Co. merchants, *Bremen*, the net proceeds being, after deducting charges, &c. $3,505 91; and also produced the accounts filed by the defendant. The plaintiff then gave in evidence, that the entries in said accounts, under date of the 30th of July and 3d of August 1804, of $15,352 15, and $3,505 91, were for tobacco shipped by *T* and *A. Contee* to the house of *Allstan* and *Brothers*, before the house of *J.* and *C. Allstan* had existence. He then prayed the court to direct the jury, that if they believed from the evidence that the firm of *T.* and *A. Contee* repeatedly acknowledged they owed the firm of *J.* and *C. Allstan* the debt due them; and if it appears from the accounts exhibited to the jury, that no such sum could be due to *J.* and *C. Allstan*, unless the above credits were applied to the balance due *Allstan* and *Brothers*; and if the jury find from the evidence that the tobaccoes for which the said credits are given, were shipped to the house of *Allstan* and *Brothers*, and not to the house of *J.* and *C. Allstan*, and that the accounts produced contain debits and credits relating to both firms, and that any mistake has been made, that then the jury are not precluded or debarred from rectifying any such mistake, if they find one to exist, but may apply said credits, if in their judgment on the whole evidence it is proper, to the account of *Allstan* and *Brothers*. This direction the Court [*Shriver*, A. J.] refused to give to the jury. The plaintiff excepted.

6. The defendant then prayed the opinion of the court to the jury, that upon the whole evidence given in this cause, the facts proved were not sufficient in point of law to entitle the plaintiff to recover And this opinion the Court, [*Shriver*, A. J.] gave to the jury. The plaintiff excepted. Verdict and judgment for the defendant. The plaintiff having afterwards died, his administrator brought the present writ of error, returnable to this court.

The cause was argued before Chase, Ch. J. and Buchanan, Earle, Johnson, Martin, and Dorsey, J.

Taney, for the Plaintiff in error. The facts established by the record are. that *T.* and *A. Contee* being partners in trade, became indebted to the house of *Allstan* and *Brothers*, composed of *J. C.* and *H. Allstan*. *Allstan* and *Brothers* dissolved partnership on the 31st of December 1803, and the house of *J.* and *C. Allstan* began business on the 1st of January 1804. By agreement between the parties, *J.* and *C. Allstan* took the balances due to *Allstan* and *Brothers*, and became responsible for the debts due from them, and *T.*

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and *A. Contee* had notice of this arrangement, and assented to it. The balance due from the *Contees* was brought into their account with *J.* and *C. Allstan*. The account was rendered to the *Contees* with this item in it, and they promised to pay it. It appears also from the accounts, that the account of *Allstan* and *Brothers*, and *J.* and *C. Allstan*, with the *Contees*. were in some items blended together, and what properly belonged to the one was put in the other. Upon this statement it is contended—1. That the plaintiff below was. and his administrator, the plaintiff in error, is entitled to recover the balance formerly due to *Allstan* and *Brothers*. 2. That the plaintiff in error is entitled to recover on the count for sundry matters properly chargeable in account, or on the *insimul computassent*. 3. That if there was any mistake by putting in the account of *J.* and *C. Allstan* credits to *T.* and *A. Contee*, which properly belonged to the account of *Allstan* and *Brothers*, the plaintiff was not estopped from showing the mistake, and the jury had a right to correct it.

On the *first point* he cited *Fenner vs. Meares*, 2 *W. Blk. Rep.* 1269. *Israel vs. Douglas*, 1 *H. Blk. Rep.* 239. *Surtees vs. Hubbard*, 4 *Esp. Rep.* 204. *Peake's Evid.* 240, 241; and *Onion vs. Paul*, 1 *Harr. & Johns.* 114.

Magruder, for the Defendant in error, cited *Freeland vs. Heron*, 7 *Cranch*, 151; and *Hammersley vs. Knowlys*, 2 *Esp. Rep.* 666.

Johnson, J. delivered the opinion of the court. The declaration in this case is in the usual form, containing amongst others, a count *on an account*, and an *insimul computassent*. The questions which arose were as to the form of the action. and as to the merits of the subject in controversy.

The facts, as the plaintiff offered evidence to prove, are that *T.* and *A. Contee* were indebted to *J. C.* and *H. Allstan*, under the firm of *Allstan* and *Brothers*. The partnership of *Allstan* and *Brothers* was dissolved on the 31st December 1803, and the next day *J.* and *C. Allstan* commenced business, and took upon themselves the collection and payment of the debts which were due from and to *Allstan* and *Brothers*. *T.* and *A. Contee* were acquainted with the dissolution of the first, and commencement of the new partnership, and continued their dealings with *J.* and *C. Allstan*.

In the account rendered by *J.* and *C. Allstan* to *T.* and *A. Contee*, long before the suit was brought, they are charged with a *balance* which *was* due to *Allstan* and *Brothers*, as *then* due to *J.* and *C. Allstan*. And whether that item could be recovered in this action, is the subject of the *first* bill of exceptions. In this bill of exceptions the plaintiff offered evidence to prove, that *T.* and *A. Contee*, before the account of *J.* and *C. Allstan* was presented to them containing a charge for the above balance, had been furnished with an account by which that balance was ascertained to have been due to *Allstan* and *Brothers*, and that with

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this information on the part of *T.* and *A. Contee*, they acknowledged the balance as charged to be due, and promised the payment thereof. On this evidence "the defendant prayed the court to direct the jury, that in forming their verdict, they are not to consider, as a charge against the defendant, any balance *originally* due to *Allstan* and *Brothers*." Which opinion and direction the court gave.

The broad ground taken by the court below, that if the debt was *originally* due to *Allstan* and *Brothers*, the suit could not be sustained, seems to rest on a principle, that the assignee of a debt resting on an open account, could in no instance support an action in his own name to recover such debt. The law on authority appears to be otherwise. In *Fenner vs. Meares*, 2 *W. Blk. Rep.* 1269, the assignee of a bond, on a promise by the obligor to pay him the debt, sustained an action of *assumpsit* on the promise. The principle, that in certain instances the assignees of debts may sustain actions in their own names, is also established in *Israel vs. Douglas*, 1 *H. Blk. Rep.* 289. *Surtees vs. Hubbard*, 4 *Esp. Rep.* 205. And in 2 *Peake's Evid.* 240, 241, the action was sustained in the name of two partners to recover a debt which was *originally* due to *one*. If then a suit can be sustained in the name of two to recover a debt originally due to one partner, surely no reason exists why *two* partners should not, in their own names, recover a debt which was due to three, when one of them has transferred to the others his interest, and when the debtor, with the knowledge of the fact, acknowledges the debt to be due, and promises them the payment. To the debtor it is of no moment in what right he is compelled to pay the debt provided he is not liable again for the money in a different right; but, as the payment to the assignee of an account or bond, would exonerate the debtor from the original creditor, so will a judgment on the assigned claim also discharge him from the original cause of action, whether the recovery is founded on a formal count stating the original debt, assignment and promise, or on an account disclosing the nature of the original transaction.

On the *second* bill of exceptions the court refused to give the opinion as prayed on the part of the plaintiff. that "if the jury find from the evidence that *J.* and *C. Allstan* had accounted with the firm of *Allstan* and *Brothers* for the sum due from *T.* and *A. Contee*, and that they, with a knowledge thereof, and that *J.* and *C. Allstan* settled with *Allstan* and *Brothers*, promised to pay the amount to *J.* and *C. Allstan*, then the action for that item was sustainable." The court below refused to grant the prayer, not because the law was against the application, but because the court were of opinion that there was no evidence of such facts. In this opinion we think the court were mistaken; for the various accounts disclosing the whole transaction, united with the repeated promises to pay, together with the parol evidence admitting a large sum to be due, were circumstances proper to be left to the jury.

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The same considerations which induced the belief that the court below erred in the *second* bill of exceptions, are equally applicable to the *third*.

The *fourth* bill of exceptions, in which the jury were precluded by the opinion of the court from applying the payments made by *T.* and *A. Contee* to discharge the item in the account of *J.* and *C. Allstan*, which was due to *Allstan* and *Brothers*, is not very material to the merits of the cause; for as the plaintiff has a right to recover for that item, it is unimportant how the credits are applied. But this court are of opinion, that as the claim of *Allstan* and *Brothers* composed a part of the claim of *J.* and *C. Allstan*, and was prior to the debt due to *J.* and *C. Allstan*, without any special direction the payments ought to have been applied to that claim, more especially as the fund, from whence the money was received, was forwarded to *Allstan* and *Brothers* before the new partnership commenced, and there is nothing in the account, on which the suit is brought, to preclude such application.

These remarks are equally applicable to the *fifth* and *sixth* bills of exceptions, except in the last, the defendant's defence, and the opinion of the court, would be sustained if the act of limitations barred the action. But this court are of opinion that the evidence takes the case out of the act of limitations.

This court are of opinion, that the court below were mistaken in the opinions given in all the bills of exceptions.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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L R and G R entered into the following agreement in February 1814: "L R has agreed to furnish G R with 15,000 dollars amount of *United States* loan, to be furnished out of the first loan at 88 dollars, for 100 dollars in stock." And afterwards in March 1814, the following agreement was entered into and signed by G R, viz "In compliance with an agreement made between L R and myself, I hereby authorise and empower him to subscribe in my name and for my use, to the loan shortly to be brought forward by the *U. S.* for the present year, to amount of £15,000, which amount he engages and secures to me shall not cost to me any higher rates than the loan of 15 millions was obtained at; and I hereby engage to make all payments on the said stock of £15,000 he also engaging to me that it shall be rated and cost me as did that of the 18 millions loan to the original subscribers. In case any difference of cost of the said £15 000 more or less, than that of the 16 millions loan, such difference of cost shall be paid in money by the losing party. L R is also authorised to make good his contract with me by the purchase of stock of any of the former government loans, and I contract on my part to make payment for such stock on the same days and proportions of instalments on which the new loan is settled and demanded." Upon the last mentioned agreement L R brought an action of *assumpsit* against G R, averring in his declaration (having sundry counts,) that he, L R, did, in the name of G R, subscribe for 15,000 dollars of the loan of 1814, at 80 dollars for each 100 dollars, being 8 dollars for each 100 dollars less than the loan of 16 millions cost the original subscribers, making a difference of 1364 dollars, for which last sum the action was brought. Under the act of Congress of March 1814, the Secretary of the Treasury in May 1814, offered to borrow 10 millions of dollars, part of the 25 millions authorised to be borrowed by that act. L R subscribed for G R £15,000, at the rate of 88 for 100 and obtained certificates of scrip for 17,045 50, to which was annexed a condition, that if any part of the 25 millions should be borrowed upon terms more favourable to the lenders, the benefit of such terms would be extended to the persons who may then hold the scrip certificates, or certificates of funded stock. G R paid the several instalments on the loan, and L R delivered to G R the certificates of scrip. In August 1814 a further subscription for 6 millions of dollars was proposed by the Secretary of the Treasury, and 3 millions subscribed for at 80 dollars for every 100 dollars. G R, being the holder of the scrip certificates, applied for and obtained certificates of funded stock thereon, for the further sum of 1704 50 dolls. The county court gave judgment that L R was not entitled to recover. On appeal, *reversed*; and also held that the declaration (to which objections were made) was sufficient.

A speculating contract as to the price of stock is not a wager inconsistent with the policy of the law, and therefore not void under the act of 1813, ch. 84.

APPEAL from *Baltimore* County Court. This was an action of *assumpsit*, on a special agreement, brought on the

30th of September 1814. The declaration contained *four* counts. The *first*, "that whereas on the 10th of March 1814, at *Baltimore*, to wit, at the county aforesaid, a certain discourse was had and moved between the defendant, (now appellee,) and the plaintiff, (the appellant,) on the terms upon which the loan to be brought forward by the *United States* for the said year 1814, would be effected; upon which said discourse then and there, that is to say, on, &c. at, &c. in consideration that the plaintiff, at the special instance and request of the defendant, had then and there undertaken to subscribe in the name and for the use of the defendant, to the aforesaid loan, to the amount of $15,000, and had also then and there undertaken and promised that the said amount of $15,000 should not cost the defendant any higher rates than the *United States* loan of 16 millions was obtained at, he the defendant then and there undertook and faithfully promised the plaintiff, that he the defendant would make all the payments which might be required on the said subscription to the said loan, to the amount of $15,000, at the rate or rates aforesaid, whenever the said payments should respectively become due; and that in case the said $15,000 of the said loan for the said year 1814, should be rated to, and cost him the defendant less than the same sum was rated to and cost the original subscribers to the aforesaid loan of 16 millions, that he the defendant would pay to the plaintiff the difference on the amount of $15,000. And the plaintiff in fact saith, that afterwards, to wit, on, &c. he the plaintiff did subscribe, in the name and for the use of the defendant, to the said loan, for the said year 1814, to the amount of $15,000, upon the following terms; that is to say, at $80 for each $100 of stock subscribed for, which was $80 per share of stock less than the terms of subscription to the said loan of 16 millions; by means whereof the defendant became liable to pay to the plaintiff the said difference in the terms on the sum of $15,000, to wit, the sum of $1364 current money, of all which premises the defendant on, &c. at, &c. had notice, and the plaintiff then and there requested the defendant to pay him the said sum of $1364 current money, according to the said promise and undertaking of him the defendant." The *second count*: "And whereas also, to wit, on, &c. at, &c. in consideration that the plaintiff at the like special instance and request of the defendant, had then and there undertaken to subscribe in the name, and for the use of the defendant, to the aforesaid loan for the year 1814, to the amount of other $15,000, and had also then and there undertaken and promised, that the said amount of $15,000 should not cost the defendant any higher rates than the loan of 16 millions was obtained at, he the defendant then and there undertook, and faithfully promised the plaintiff, that he the defendant would make all the payments on the said stock of $15,000; and that in case there should be any difference of cost of the said $15,000, more or less than that of the 16 millions loan,

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that such difference of cost should be paid in money by the losing party. And the plaintiff in fact saith, that afterwards, on, &c. at, &c. he the plaintiff did subscribe in the name and for the use of the defendant, to the said loan for the year 1814, to the amount of $15,000, which said amount of $15,000 did not cost him the defendant any higher rates than the loan of 16 millions was obtained at. And that there was a difference of cost of the said $15,000, to wit, the sum of $1364 less than the price of the same sum of the said 16 millions loan to the original subscribers, in consequence whereof the defendant was the losing party; by means whereof the defendant became liable to pay to the plaintiff the said difference of cost of the said $15,000, to wit, the sum of $1364 current money—of all which premises the defendant on, &c. at, &c. had notice, and the plaintiff then and there requested the defendant to pay him the said sum of $1364 current money, according to the said promise and undertaking of him the defendant." The *third count:* "And whereas also heretofore, to wit, on, &c. at, &c. in consideration that the plaintiff, at the like special instance and request of the defendant had then and there undertaken to subscribe in the name and for the use of the defendant to the aforesaid loan for the year 1814, to the amount of other $15,000, and had also then and there undertaken and promised that the said amount of $15,000 should not cost the defendant any higher rates than the aforesaid loan of 16 millions was obtained at, he the defendant then and there undertook and faithfully promised the plaintiff, that he the defendant would make all the payments which might be required on the said subscription to the said loan, to the amount of 15,000 dollars, whenever the said payments should respectively become due; and that in case the said 15,000 dollars of the said loan for the year 1814 should be rated to and cost him the defendant less than the same sum was rated to and cost the original subscribers to the aforesaid loan of 16 millions, that he the defendant would pay to the plaintiff the difference on the amount of 15,000 dollars. And the plaintiff in fact saith, that afterwards, to wit, on, &c. he the plaintiff did subscribe in the name and for the use of the defendant, to the said loan for the year 1814, to the amount of 15,000 dollars, upon the following terms; that is to say, at 88 dollars for each 100 dollars of stock, with this proviso, that in case any of the said loan for the year 1814 should be sold by the government at any terms lower than 88 dollars for each 100 dollars of the loan, that then and in such case the government should return to the defendant the said difference. And the plaintiff further saith, that the government did sell part of the said loan for the year 1814, at 80 dollars for each 100 dollars of the said loan subscribed for, and in conformity with the proviso of the plaintiff, did return to the defendant the difference of eight dollars for each 100 dollars of the loan subscribed for, in consequence whereof the said 15,000 dollars was rated to and cost the

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defendant less than the same sum was rated to and cost the original subscribers to the said sixteen millions loan; by means whereof the defendant became liable to pay to the plaintiff the said difference in price, to wit, the sum of $1364 current money. Of all which premises the defendant on, &c. at, &c. had notice. And the plaintiff then and there requested the defendant to pay him the said sum of $1364 current money, according to the said promise and undertaking of him the defendant." The *fourth count:* "And whereas also heretofore, to wit, on, &c. at, &c. a certain discourse was had and moved between the defendant and the plaintiff, on the terms upon which the loan then about to be brought forward by the *United States* for the year 1814, would be effected; upon which said discourse the plaintiff then and there affirmed, that if the defendant would authorise and empower him the plaintiff, in writing, to subscribe in the name and for the use of the defendant, to the said loan for the year 1814, to the amount of $15,000, and would engage in writing to make all the payments on the said amount of $15,000, whenever they should respectively become due, that he the plaintiff could procure for the defendant $15,000 of the said loan for the year 1814, at such rates and upon such terms as that the said amount of $15,000 of the said loan for the year 1814, should cost the defendant less than the same amount of $15,000 of the loan of sixteen millions cost the original subscribers, which the defendant did deny, and did promise the plaintiff, that in case he the plaintiff would promise to procure for the defendant $15,000 of the said loan for the year 1814, at the rates and terms aforesaid, and would promise to pay the difference in case the said $15,000 of the said loan should cost more than he the defendant would authorise and empower him the plaintiff, in writing, to subscribe in the name and for the use of the defendant to the said loan for the year 1814, to the amount of $15,000, and would engage in writing to make all the payments on the said amount of $15,000 whenever they should respectively become due, and that in case he the plaintiff should procure the said amount of $15,000 at such rates, and upon such terms as that the said amount of $15,000 should cost the defendant less than the same amount of the said loan of sixteen millions cost the original subscribers, that he the defendant would pay to the plaintiff the difference. And the plaintiff in fact saith, that he did promise the defendant as aforesaid, and that in compliance with his promise, he the plaintiff did procure for the defendant $15,000 of the said loan for the year 1814, upon the following terms; that is to say, at $80 for each $100 of the said loan subscribed for, which was eight dollars for each $100, less than the loan of sixteen millions cost the original subscribers, making a difference of $1364; by means whereof the defendant became liable to pay to the plaintiff the said difference, to wit, the sum of $1364 current money. Of all which premises the defendant on, &c. at, &c. had notice; and the plaintiff then

1818. and there requested the defendant to pay him the said sum of $1364 current money according to the said promise and undertaking of him the defendant. Nevertheless," &c. The general issue was pleaded. And at the trial the plaintiff gave in evidence the following memorandum, in writing, made by *William Norris*, by the direction of the plaintiff and defendant, and which was signed by said *Norris* by the direction of both plaintiff and defendant, as their agent: "*Balto.* 1th Feby. 1814. Mr. *Lott Ridgely* has agreed to furnish Mr. *George Washington Riggs* with $15,000 amt. of *United States* loan, to be furnished out of the first loan at $88 for 100 in stock.

William Norris."

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The plaintiff further gave in evidence the following written agreement, and which it was admitted was signed by the defendant: "*Baltimore*, March 10th, 1814. In compliance with an agreement made between *Lott Ridgely* and myself, I hereby authorise and empower him to subscribe in my name, and for my use, to the loan shortly to be brought forward by the *United States* for the present year, to amount of fifteen thousand dollars, which amount he engages and secures to me shall not cost to me any higher rates than the loan of sixteen millions was obtained at, and I hereby engage to make all payments on the said stock of $15,000, he also engaging to me that it shall be rated and cost me as did that of the sixteen millions loan to the original subscribers. In case any difference of cost of the said $15,000 more or less than that of the sixteen millions loan, such difference of cost shall be paid in money, by *the losing party*. Mr. *Ridgely* is also authorised to make good his contract with me by the purchase of stock of any of the former government loans, and I contract on my part to make payment for such stock on the same days and proportions of instalments on which the new loan is settled and demanded.

Geo. W. Riggs."

It was admitted by the defendant, that in pursuance of the act of congress of the 24th March 1814, the secretary of the treasury of the *United States* offered to borrow ten millions of dollars, part of the twenty-five millions authorised to be borrowed by said act of congress, and appointed the second day of May in the same year, at the *Mechanics Bank* of *Baltimore*, to receive subscriptions for the said loan; and that the plaintiff did, on the said 2d of May, subscribe for and on behalf of the defendant, $15,000 to the said loan, at the rate of $88 for every $100 of stock created therefor by the *United States*; that is, for the said $15,000 so subscribed, he obtained certificates of scrip to the amount of $17,045 50; to which said certificates the following condition was annexed, to wit: "And if any part of the sum of 25 millions of dollars, authorised to be borrowed by the act aforesaid, shall be borrowed upon terms more favourable to the lenders, the benefit of the same terms will be extended to the person

or persons who may then hold this scrip certificate, or certificate of funded stock which may be issued in lieu of it, after the payments upon it are completed." It was also admitted, that the defendant paid the several instalments, as they became due, according to the terms of said subscription; and that the plaintiff did, in pursuance of the agreement and authority herein before set forth from the defendant, deliver to the defendant the said certificates of scrip for said subscription, with the condition aforesaid annexed to each of them. It was also admitted by the defendant, that the secretary of the treasury, in pursuance of the said act of congress, proposed to receive further subscriptions for six millions of dollars, a further part of the said loan of twenty-five millions of dollars, authorised by the act of congress aforesaid, and appointed the 22d day of August 1814, at the *Mechanics Bank of Baltimore*, and authorised *Dennis A. Smith* to receive said subscriptions; and then and there a large amount, to wit, about three millions of said loan, was subscribed for by divers persons at the rate of $80 for every $100 worth of stock to be created therefor by the *United States*. And the defendant, being the holder of the said certificates of scrip delivered to him by the plaintiff, applied to the proper officer of the government of the *United States* for that purpose, and received, in pursuance of the condition aforesaid annexed to said certificates of scrip, on the 2d of December 1814, certificates of stock thereon for the further sum of $1.704 50, being the amount of the difference between $88 the price of subscription for every $100 of the loan of sixteen millions referred to in said agreement and authority signed by defendant, as herein before set forth, and $80 for every $100 of stock, the price of the subscription made as aforesaid on the 2d of May aforesaid, as regulated and fixed by the rate of subscription aforesaid on the 22d of August 1814. It was further admitted, that the whole of said loan of twenty-five millions of dollars, authorised by the said act of congress aforesaid, has never been filled up. The defendant then moved the court to direct the jury, that if they believed these facts so given in evidence and admitted, the plaintiff was not entitled to recover. Which opinion and direction the Court, [*Bland* and *Hanson*, A. J.] accordingly gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON and MARTIN, J.

Winder, for the Appellant. The only question in the cause is, whether the proof supports the case as set forth in the declaration? The plaintiff was only bound to state the legal effect of his contract, and this legal effect is sustained by the proof. He performed the services, and comes within the defendant's promise.

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Another question may probably be raised—Whether it is not an illegal wager upon which the party cannot recover? It was a sort of insurance, and is not a wager in a legal or vulgar acceptation of the term. What might be illegal in *England*, as in *Atherfold vs. Beard*, 2 *T. R.* 610, as to a speculation in the public funds, would not be so here. The essence of our government is that the public revenue should be discussed. Stockjobbing was universally permitted in *England*, until prohibited by act of parliament in particular cases; but there is no prohibition in this country.

Pinkney, for the Appellee. 1. The two agreements offered in evidence are to be taken together. The declaration and the agreement are at variance, and the court below were right in saying the plaintiff was not entitled to recover. None of the counts in the declaration are suited to the plaintiff's case. The *first* count is objected to on two grounds—1st. It mistakes the terms upon which the loan was negotiated. It does not contain the precise terms of the contract; but states the terms of the loan peremptory at 88, with a condition depending upon an event which might or might not happen. 2d. The consideration of the promise is mistated, or rather it is inconsistent with the agreement. If it is a mistatement, it is fatal. It is a mistatement essential and at variance with the contract. The engagement of the 8th of February 1814, is to furnish 15,000 dollars out of the first loan at 88 for 100. This was afterwards modified on the 10th of March, and the effect of the two engagements gave him an alternative. He might forbear to execute the promise in the engagement of the 10th of March. What is represented as the promise was not the inducement. He might furnish other stock, and this is not set out in the count, and is therefore at variance with the agreement. If it is necessary to set out the consideration, so must also the promise be set out. The consideration is an essential part of the contract. It is the foundation upon which the promise stands, and it is as necessary to be set out as the promise; and a mistatement of the one is as fatal as the other. *Penny vs. Porter*, 2 *East*, 2, turned upon the mistatement of the *promise*, and is similar to a mistatement of the *consideration*. Here the plaintiff has averred a promise, without stating the alternative—it is therefore not the same promise that was entered into. He was bound to set out his own obligations. The whole consideration of the promise must be stated, otherwise the contract is mistated, and is a fatal variance. *Miles vs. Sheward*, 8 *East*, 9. This was a connected transaction, and the whole should be stated. The contract on the part of the plaintiff was a condition precedent, and forms the substratum upon which the whole was founded. The plaintiff did subscribe for the stock, and put an end to the alternative. It was not necessary to meddle with the matter of fact. He was bound to set out his contract with reference to the defendant. Subsequent events having rendered it

unnecessary has nothing to do with it. He must set out what the promise was, and that he had elected one of the two alternatives, and then the evidence would be applicable to the subsequent events. He cannot count solely on the legal effect, as brought about by subsequent matters. Every plaintiff is bound to mount up to the commencement of the contract, and should set the whole out. The same objections equally apply to the *second* count. The *third* count has two essential defects. It substitutes what is not in the contract—"then and in such case the government should return to the defendant the said difference." There is no such provision in the agreement. The government made no such pledge. The difference was to be made up by stock to the holder of the certificate at the epoch of completing the loan. This is not only an inartificial statement, but is an inadequate one. It might never be a matter of fact that a loan would be negotiated, or that any part of it would be negotiated on different terms. It depended upon a variety of circumstances—Whether the government would want more money—Whether lenders could be procured and the terms, &c. It was a mere possibility whether the person who obtained the certificate should be the holder at the time when the contingency might happen. It might be the defendant, or his executors or assignees. If it was incumbent on the plaintiff to state the proviso, it was incumbent on him to do it correctly. The *fourth* count states a conversation and assumption, that the plaintiff took upon himself and promised the defendant, that he would procure the loan for less, &c. Here is a wager; it is a bet that he would get it for less, but no promise that he would procure it for less than 88 for 100. This difference constitutes the wager. One party does not wish the other to perform, but wishes him to fail to perform. The plaintiff did not promise to deliver the stock for less than 88 for 100. The whole declaration is manifestly defective; and if this was an action entitled to the peculiar favour of the court, still the consideration and promise must be correctly stated in the declaration.

2. This action was brought on the 30th of September 1814, and the second certificate for the stock was received by the defendant in December 1814, after the action was brought. The plaintiff can only recover upon the right as it existed at the time the suit was brought. If the subsequent receipt of the second certificate, produced in evidence, has any thing to do in the cause, then the suit was brought too soon. The plaintiff having sued before his right of action was perfected, he must fail.

3. But this was a mere wager, inconsistent with the policy of the law, and is therefore void, under the act of December 1813, *ch.* 84. It is manifestly a wager, and cannot be considered in any other light. Here the defendant was to pay—the plaintiff to pay nothing. The wager then commences—that the stock will cost more or less—the difference to be paid by the losing party. What is a

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wager, if this is not? The plaintiff was to pay nothing, but was only to act ministerially in subscribing to the loan. He contracted no liability by subscribing; for so soon as he does subscribe, the defendant pays. Then comes the wager—if the stock loaned is higher or lower, then to pay or not. This was a contingency; and if so, then the bet was void at law. If considered as a wager, the act of 1813 puts it out of the question, and the plaintiff cannot recover.

4. What is the import of the contract compared with the subsequent events? Putting the technical objections to the declaration out of the way, has the plaintiff made out his case? He must show, without any ambiguity, that he has a right to recover. There is nothing in the peculiar merits of the case to induce the court to stretch the law so as to show the plaintiff has a right to recover. What part of the contract is it which induces a supposition that he has a right to recover? It is not the first engagement, because if the stock was procured under that engagement, the plaintiff would be satisfied. But it is not upon that engagement, it is upon the subsequent one that he relies. That engagement refers to the loan of 16 millions. Does it look to the event or end of that loan? How long were the parties to wait until the contract was completed? Here was a proviso, and the subsequent part of the loan might never be negotiated. Was the contract to continue open waiting for an uncertain event which might never happen—a bare possibility to be realized at a distant period. The natural epoch to which they are disposed to look, is on the completion of that particular subscription—not to the subsequent loan. The stock might or might not be loaned on different contingencies, there being no positive provisions. It was a floating contract, and the possessor of the stock could not tell upon what terms he held it. Suppose the defendant had sold the stock before the loan was fully made, he would fail to receive the benefit which was given by the secretary of the treasury on the subsequent loan. The defendant had every thing to lose, and nothing to gain. His hands were tied up, and the plaintiff left to gain every thing, and to lose nothing. The epoch of the completion of the contract was to be the time of the negotiating of the loan, and it had nothing to do with waiting for what might happen on a further or second negotiating the loan; otherwise it would be to say that the defendant held the stock upon an uncertain tenor. He could not sell, for fear he might get less, and be liable to pay the plaintiff for the deficiency. It would be locking up the stock, and keeping it out of market. If these are not matters of fact, they are what might have been facts. The parties risked on the original terms of the loan, and they looked to no other period. They could not suppose, at the time of the contract, that the whole loan would not have been taken at the first opening the subscription. The benefit given in the provi

so was to whosoever should be the holder of the stock, and if the defendant had sold, he could not be benefited by the terms of the subsequent loan. How can this court, which seeks for certainty, say this is a case in which there is no uncertainty? Can this court believe it is clear that the parties looked to every possible event which might happen relative to the stock? Whatever construction the court may put upon the contract, they cannot say it is clear, and if there is doubt, the plaintiff must fail. 1818. Ridgely vs Biggs

Winder, in reply. The plaintiff is not bound to state in his declaration the successive stages in the progress of a contract. It is only necessary to bring the particular fact before court. To show the legal effect of the contract, he might state, and properly too, that he subscribed at 80 for 100. If the legal effect of subscribing at 88 for 100 is a subscription at 80 for 100, then the plaintiff's stating it to be at 80 is correct, and he need not state all the antecedent several stages which brought about the legal effect which is set out. It was a conditional act to be affected by a subsequent event, and if that event is stated, that is enough. In *Penny vs. Porter*, the *party sued* agreed to do one of two things. He was charged, and it should therefore be stated how he was charged, because he might prove that he had elected differently than that stated. But here the plaintiff, by stating in his declaration, shows his election, which he had performed. In the case cited, the defendant had an alternative, here the alternative was with the plaintiff. But this is not an alternative engagement. It is to furnish so much stock in the approaching loan. The plaintiff might accept one act in lieu of another; and it was only necessary for him to set out that which he had performed. Suppose a man engages to build a house by a particular day, and he so declares, but it turns out in evidence that he did not perform by the day; yet if he proves he was excused by the defendant, still he may declare upon the original contract. The subsequent writing of March 1814, goes into a detail of the first engagement, and is nothing more than a mere permission given to the plaintiff what stock he might furnish, which he does not bind himself to do, and is not therefore an alternative engagement. The case of *Miles vs. Sheward*, does not bear more upon the case before the court than does *Penny vs. Porter*. If the two first counts are good, then it is immaterial what may be the character of the others, because this court may apply the verdict to any good count. The *third* count does, it is admitted, seem to be defective, and the objections to it to be valid.

But it is objected that the suit is prematurely brought, because the second certificate of stock was not received until after the suit was instituted. The moment it was ascertained that the subsequent stock, subscribed for in August, was obtained at 80 for 100, the plaintiff's cause of action accrued. He was then to consider his subscription

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in May, as a subscription in August. The objection therefore is wholly unfounded.

It is said again, this is a wager. If it is, every contingent contract is a wager. Almost every contract depends upon a contingency; and if this is considered a wager, it will put an end to all contracts. Suppose A agrees to give B $3 per bushel for his wheat; but if the price in three months should be more or less, then A agrees to give that price. This is a wager about the price of wheat; but will it be said to come within the act of 1813. The words of that act embraces every insurance; but can it be supposed that the legislature intended to take in cases of insurance. The act is only intended to strike at *gambling*, and does not extend to contracts. There is nothing to constitute this contract a wager, unless it be because it depends upon a contingency. But it is said that the contract is ambiguous, and wholly uncertain, and, therefore, cannot be enforced; and it is contended to be uncertain, because it depends upon a contingency which possibly might not happen. Congress, however, supposed the contingency would happen. The parties did not create the contingency, it was the government who did it. If this was a subject which might be attached, then it entered into the contract of the parties. The government might borrow money, and fix the terms at a future period. There can be no doubt or difficulty as to the contract. If the event had never happened, then the plaintiff would never have come into this court to enforce his contract. The parties chose to make the contract, and if it bears hard on the defendant, it was one of his own seeking. He made it with his eyes open. If there was any clog to the free circulation of the stock, who made it? not the plaintiff—It was the act of the government. The defendant was not bound to keep the stock, he might have parted with it if he had seen fit.

Earle, J. delivered the opinion of the court, reversing the judgment of the County Court

Buchanan, J. dissented, on the ground that the declaration was bad.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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A tract of land called *S F*, was surveyed in 1694 and patented in 1695. Another called *G C*, was surveyed in 1796, and patented in 1798. This last tract is described in the certificate and grant as beginning at a stone heretofore planted in the place or spot where formerly stood a bounded red oak, the last bounded tree of a tract of land called *S F*, and running from thence reverse of the third line of *S F* and bounding thereon, *as now laid down with an allowance of forty-five minutes, for variation* &c.—*Held*, that the first line of the tract of land called *G C*, must be run from the stone described as the place of beginning, according to the survey made of *S F* in 1796 (the time when *G C* was taken up,) with an allowance of forty-five minutes for variation, as expressed in the certificate and grant, and not according to the true location of *S F*, as *S F* was originally surveyed in 1694.

Error to *Anne-Arundel* County Court. This was an action of ejectment, to recover a tract of land called *The Addition to Goznell's Chance*. Defence was taken on warrant, and plots were returned.

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1. At the trial the plaintiff, (the appellant,) with other testimony, gave in evidence the patent of the tract of land called *Smith's Forest*, surveyed the 6th of March 1694 for, and granted to, *Philemon Smith*, on the 10th of November 1695, and described as "lying on the south side of *Curtis's* creek, beginning at a bounded pine standing in the line of a parcel of land formerly laid out for *Maurice Baker*, and running with the said line S S E 484 perches, then W S W 60 perches, then N W 536 perches, to a bounded red oak standing by *Curtis's* creek, then N E by E 46 perches, then by a straight line to the first bound pine, containing and laid out for 200 acres of land more or less." He also read in evidence a patent of a tract of land called *The Addition to Goznell's Chance*, surveyed on the 25th of November 1796 for, and granted to, *George Ashpaw* and *John Rowles*, on the 2d of August 1798, and described as "beginning at a stone planted in the place or spot where formerly stood a bounded red oak, the last bounded tree of a tract of land called *Smith's Forest*, and the beginning tree of the original tract of land called *Goznell's Chance*, which said stone is also the beginning of the original tract of land called *Love in a Village*, and running from thence reverse of the third line of the aforesaid *Smith's Forest*, and bounding thereon, as now laid down, with an allowance of 45 minutes for variation, S 23° 15′ E 559 perches, then S 66° 45′ W 75 perches, then running with and bounding on the third line of the original *Goznell's Chance*, as now laid down, to correspond with the beginning of the aforesaid *Crouche's Forest*, N." &c. The defendant then prayed the opinion of the court to the jury, that the land called *The Addition to Goznell's Chance* must be located so as the first line thereof shall bind on the third line of *Smith's Forest*, as that tract was originally located. The Court, [*Chase*, Ch. J. and *Ridgely*, A. J.] were of opinion, that it was the right and province of the jury to decide what was the proper allowance to be made for the variation of the compass according to the evidence; and that the jury having first ascertained what was the true location of *Smith's Forest*, that then the first line of *The Addition to Goznell's Chance* must run with the third line of *Smith's Forest*, according to the true location of that tract. The plaintiff excepted.

2. The plaintiff then prayed the opinion of the court to the jury, that to ascertain the true location of *The Addition to Goznell's Chance*, the third line of *Smith's Forest* must be run as it was located at the time the resurvey called *The Addition to Goznell's Chance* was made. This opinion the court refused to give. The plaintiff excepted; and the verdict and judgment being against him, he brought a writ of error, returnable to this court.

The cause was argued before BUCHANAN, EARLE, JOHNSON, MARTIN, and DORSEY, J.

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Stephen, for the Plaintiff in error.

Magruder, for the Defendant in error. He cited *Green vs. M'Clellan*, (*Ante* 200.)

Buchanan, J. delivered the opinion of the Court. After stating the facts he proceeded. The point in controversy is, how the first line of *The Addition to Goznell's Chance* ought to be run from the stone described as the place of beginning, whether according to a survey of *Smith's Forest* made on the 25th of November 1796, (the day on which *The Addition to Goznell's Chance* was taken up,) with an allowance of forty five minutes for variation, as expressed in the certificate and grant, or according to the true location of *Smith's Forest*, as originally surveyed on the 6th of March 1694? There is no difficulty in expounding the grant of *The Addition to Goznell's Chance*. The words, *as now laid down with an allowance of forty-five minutes for variation*, with reference to *Smith's Forest*, are not used to show the true location of that tract of land, but to describe the manner in which *The Addition to Goznell's Chance* was run when originally taken up. There is no ambiguity, latent or patent; the position of the land, as it was originally laid down, is clearly described; and the question is not, how a general indefinite call (in the description of a junior,) to the lines of an elder tract of land, should be gratified, which need not be here examined; but whether the expressions in a grant, particularly designating the manner in which the land was originally surveyed, shall be held to control the location, or be altogether rejected.

As a general position, nothing is more clear, than that the description contained in a grant shall govern, and that the land intended to be conveyed, shall be ascertained and pass by the description so given, and no reason is perceived for distinguishing this from any other case.

It is not important what the true location of *Smith's Forest* is, or what allowance for the variation of the magnetic needle would have been necessary and proper to ascertain its true location, when *The Addition of Goznell's Chance* was surveyed—Whether forty-five minutes or forty-five degrees—The intention was, that the first line of *The Addition to Goznell's Chance* should be regulated, not by what might be the true location of *Smith's Forest*, but by a running of that tract of land on the 25th of November in the year 1796, with an allowance of forty-five minutes for the variation of the needle, as distinguished from the original location; and to give to it any other location, would be, not only to defeat that intention, and entirely disregard the expressions of the grant, by which it is manifested, but also to depart from the actual original running of the land—And for what purpose? Surely not for the greater certainty; a specified allowance for the variation of the compass being clear of all doubt, and the true original location of *Smith's Forest*, wholly uncertain, and

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only to be ascertained by matter *de hors* the grant. Every tract of land ought to be located as it was run when originally taken up, if that can be done consistently with the expressions in the grant; and such is the particular description given in the grant of the manner in which the first line of *The Addition to Goznell's Chance* was originally run, that if one is gratified, the other must be effective. But if that description is departed from, the original running of the land must also be disregarded. We do not, therefore, concur with the court below in the opinion expressed in either of the bills of exceptions, but think that *The Addition to Goznell's Chance*, ought to be located according to the expressions of the grant.

Johnson, J. The only question arising in this cause, is, Whether *those lines* of *The Addition to Goznell's Chance*, that call *to run to, and with* lines of *Smith's Forest*, *must* run to, and be governed by, those lines, according to the *original location of that tract.*

The expressions in the certificate of *The Addition to Goznell's Chance*, are running to the line of *Smith's Forest, as now laid down with an allowance* of forty-five minutes for variation, and then running *with several lines of that tract as laid down with the same variation.* It is not recollected, that a question precisely like the one now before court has ever been submitted to its consideration. If *The Addition to Goznell's Chance must* run to, and be governed by, the original location of *Smith's Forest*, and the jury should find that location *not to correspond* with the location made of that tract by an allowance of forty-five minutes for variation in the year 1796, when *The Addition to Goznell's Chance* was taken up, then it follows that that tract would have a different location than was plainly and expressly given to it when the survey was made, and the expressions of the certificate, as *now run with forty five minutes for variation, must be rejected.* If the jury should find the true location of *Smith's Forest* to be as it was run in the year 1796, with the variation mentioned, then *The Addition to Goznell's Chance* would correspond with the original location; but as the tract called for is, in the tract calling for it, *described* as then run in a *particular manner*, I am of opinion that *The Addition to Goznell's Chance* ought not to have *been confined* to the true original location of *Smith's Forest*, and that the court below erred in directing the jury that the true original location of *Smith's Forest must control The Addition to Goznell's Chance.* I therefore concur with this Court in pronouncing that the judgment of the Court below be reversed.

JUDGMENT REVERSED. *(a)*

(a) Chase, Ch. J. withdrew from the bench at the argument and decision of this case; but afterwards furnished the Reporters with the following remarks upon the opinion delivered by this Court.

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The Court of Appeals, in expressing their opinion in this case, reject, or lay no stress upon the most *material parts of the description* of the running of the first line of *The Addition to Goznell's Chance*. *The Addition to Goznell's Chance* begins at a stone, being the place where the last bounded tree of *Smith's Forest* stood, and running from thence *reverse* of the *third line* of *Smith's Forest*, and *bounding thereon*. According to these expressions, it is plain the intention was to make the third line of *Smith's Forest* the boundary to the full extent of that line. The first line of *The Addition to Goznell's Chance* was to run with and bind on the third line of *Smith's Forest* reversed The question is, what effect ought to be given to the subsequent expressions, "as now laid down with an allowance of 45 minutes for variation, south 23 degrees 15 minutes, east 559 perches?" Certainly the surveyor could not change the true position of *Smith's Forest* The first line of *The Addition to Goznell's Chance* was to bind on the third line of *Smith's Forest* reversed. These expressions are imperative, and cannot be rejected. The plain intention was to make the third line of *Smith's Forest* the first line of *The Addition to Goznell's Chance*, to the full extent of the said third line, which can only be done by uniting and incorporating the first line of *The Addition to Goznell's Chance* with the third line of *Smith's Forest* reversed, which renders it essentially necessary to ascertain the true location of *Smith's Forest*. The mode adopted by the surveyor to ascertain the true location of *Smith's Forest* was fanciful, and cannot be considered as any part of the description of the land granted. The legislature has not yet been able to regulate the variation of the compass by any definite or precise rule. The surveyor cannot arbitrarily fix any rule. The subject belongs to the jury alone, who are governed by the circumstances of each case in making an allowance. It must be taken for granted, that the running with an allowance of 45 minutes for variation, did not correspond with the true position of *Smith's Forest;* if so the essential part of the description running with, and binding on the third line, must be rejected as inefficient and inoperative. The first line of *The Addition to Goznell's Chance* can only be ascertained by reference to the expressions, "running with and binding on the third line of *Smith's Forest*," and certainly the surveyor could not alter the location of *Smith's Forest* by giving it a position according to his notions of what was the proper allowance to be made for the variation of the compass—a subject too great and too important for his decision. Ever since the question respecting the variation of the compass has been agitated, it has been uniformly and invariably admitted and decided, that it belonged to the province of the jury alone to make the allowance. The court below were of opinion that the expressions, "thence reverse of the third line of *Smith's Forest* and bounding thereon," were binding and imperative, and not controled by the subsequent expressions, which were merely indicative of the opinion of the surveyor as to the true location of *Smith's Forest*, and does not differ from the common case of the surveyor's certifying, that he run with and binding on the line of an elder survey a particular course and distance, which course and distance do not correspond with the line of said land. In such case the court would not hesitate to say, the true construction of the grant was to adhere to the call, and reject the course and distance, although the surveyor has certified he run the course and distance particularly mentioned, as the line of the said elder tract. In what respect does this case differ from the ordinary case of a peremptory or imperative call, and course and distance, which do not correspond? Invariably and uniformly the call has been preferred, and the course and distance rejected. The surveyor certifies, that the beginning of *The Addition to Goznell's Chance* was "at a stone planted at the end of the third line

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of *Smith's Forest*, and running from thence *reverse* of the third line of said land, and bounding thereon (as now laid down with an allowance of 45 minutes for variation,) south 23 degrees 15 minutes east 559 perches."

The course and distance do not correspond with the third line of *Smith's Forest* reversed, and must be rejected, because the call is imperative. Can the reason assigned by the surveyor for running that course and distance give the course and distance any additional weight, and entitle it to the preference to a peremptory and unequivocal call? Certainly not. It is no matter what motive or reason induced the surveyor to run that course and distance; if it does not agree with the third line of *Smith's Forest*, reversed, it must be rejected. These principles are settled and cannot be shaken.

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A lessee for life or years, without special covenants, is responsible to his lessor for all injuries amounting to waste, done to the premises during his term, by whomsoever those injuries may have been done, with the exceptions of the acts of God, public enemies of the country and the acts of the lessor himself.

An action on the case in the nature of waste, will lie for waste committed by a tenant for years. And it seems it will lie for permissive waste; and that it is not necessary to declare as, for permissive waste.

The distinction taken between voluntary and permissive waste.

APPEAL from *Baltimore* County Court. This was an action of trespass on the case, in the nature of *waste*, brought by the plaintiff, (now appellant,) for waste and destruction done to her house in the city of *Baltimore*, during the time that the defendant, (the appellee,) was lessee to the plaintiff of the premises. The declaration contained *two* counts. The *first* alleged that the plaintiff was seized in her demesne as of fee, of the premises in question; that the defendant was her lessee from year to year, for the residue of a term commencing on, &c. and that the defendant during his term, &c. contriving, &c. to injure the plaintiff, &c. wrongfully, &c. committed the waste and injury complained of. The *second* count alleged that the plaintiff was possessed of the premises, without stating the quantity of her estate, that for a certain rent she demised them to the defendant for a year, and so from year to year; that the defendant agreed to pay the rent, to use the premises in a husband-like manner, and to deliver them up at the end of his term in as good tenantable repair, as they were when he took possession of them; that he did take possession under the demise, but disregarding his said promises and agreements, he on, &c. collected a large number of persons into the house; and that he, and the persons so collected, committed the waste and destruction complained of. The general issue was pleaded.

1. At the trial it was admitted that the defendant was tenant of the premises in question, as a dwelling-house, under the plaintiff, for a year, at the rent of $350, and that no covenants or agreement were entered into by the parties relative to repairs of the premises, or other matters relating thereto, other than such as are implied by law, except merely the agreement to let the premises by the plaintiff to the defendant for a year, and by the defendant to pay the said rent. That the defendant entered into possession sometime in the month of May 1812, and continued therein until the 27th of June of the same year,

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when a large armed multitude of unknown persons, being residents of the city of *Baltimore*, or of this state, assembled and combined themselves together in the said city for the purpose of pulling down the said house, and compelling the defendant to desist from the distribution of a newspaper called *The Federal Republican*, and to drive the defendant from the said city. That the mayor of the city, the judges of the court of oyer and terminer and gaol delivery for *Baltimore* county, and other civil officers of the said city and county, being informed of this combination and assemblage of an armed multitude, and the purposes for which they were so assembled, did, by all such ways and means as they deemed best calculated, from the powers they possessed, endeavour to prevent and hinder the said multitude from perpetrating their unlawful and outrageous purposes as aforesaid: but in spite of all the efforts of the said civil officers, and by a power wholly incontrolable and irresistible by the said officers, or by the defendant, the said armed multitude did compel the defendant, and his family, for the safety of their lives, to fly from and abandon said house and premises, and from the said city, and did ruin, spoil, and destroy said house, in the manner as stated in the declaration. The plaintiff then offered evidence to prove, that after the defendant took possession of the said house, he used it for the purpose of receiving therein a news paper called *The Federal Republican*, which was printed in *George Town*, in the District of *Columbia*, of which the defendant was an editor and proprietor, and from thence to distribute the same to the subscribers to the said paper, who resided in the city of *Baltimore*; and having reason to believe that the said house would be attacked by a lawless armed and unknown multitude, if the said paper was received and distributed therefrom, he collected, in a peaceable and lawful manner, a number of armed men for the purpose of defending the said house against any attack which might be made thereon by the said unknown multitude as aforesaid; and that it was after the introduction of the said armed men to defend the house, and the commencement of the distribution aforesaid therefrom, that the said armed multitude, as herein before stated, attacked, ruined and spoiled the house. To the admission of which said evidence, under the present declaration, the defendant objected. But the Court, [*Bland* and *Hanson*, A. J.] overruled the objection, and permitted the whole of said testimony to be given to the jury. The defendant excepted.

2. The defendant then moved the court to direct the jury, that if they believed the facts so admitted and given in evidence, that then the plaintiff was not entitled to recover. Which opinion and direction the Court, [*Dorsey*, Ch J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against her, she appealed to this court.

The cause was argued on the *second* bill of exceptions before Buchanan, Earle, Johnson, and Martin, J.

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Raymond, for the Appellant. This is an action of trespass on the case, in the nature of waste. It is brought to recover damages for the waste and destruction done to the plaintiff's house in *Charles-street*, in the city of *Baltimore*, by a mob in 1812, the defendant being the plaintiff's lessee of the premises at the time. The declaration contains two counts. The *first* merely stating the plaintiff's interest in the premises, the relation between the parties as landlord and tenant, and the injury done to the premises. The *second* count sets out more particularly the implied contracts which the law raises on the part of lessees, and then charges the injury to have been wilfully done by the defendant, in violation of his implied engagements. Both counts are in substance and in law the same; both charge the defendant with voluntary waste—the second setting out the implied contract by way of inducement. Evidence which would support one count, would be equally applicable to the other. Two questions naturally present themselves in the discussion of this case. The *first* question goes to the right of action. The *second* to the form of action.

1. As to the *first* question, it may be laid down as a principle of law, that a lessee for life or years, without special covenants, is responsible to his lessor for all injuries amounting to waste, done to the premises during his term, by whomsoever those injuries may have been done, with the exceptions of the acts of God, public enemies of the country, and the acts of the lessor himself. At common law those tenants only were punishable for waste, who claimed by operation of law, as guardians, tenants by the curtesy, and tenants in dower. A lessor had no remedy against his lessee for waste unless he had bound him by covenant not to do waste; because, as Lord *Coke* says, he that might and would not provide for himself, the common law would not provide for. 2 *Inst.* 145. This, however, was soon found to be a very hard and unreasonable doctrine, and the statute of *Marlbridge* was passed. 52 *Hen.* III, which provided "that farmers should not make waste, unless they had a special license, by writing of covenant, making mention that they may do waste." Lord *Coke*, in his commentary on the words "*non faciant*" in this statute, says "this statute prohibiteth that farmers shall not do waste, and yet if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law, that the farmer may withstand it, *et qui non obstat quod obstare potest, facere videtur.* The lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste; and if the lessor should not have his action of waste, he would be without remedy." This last observation must be confined to the action of waste, and then it is literally true, for waste will only lie against a tenant, although *case* will lie against a stranger

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who should do waste. 2 *Inst.* 146. *Jefferson vs. Jefferson*, 3 *Lev* 131. *Panton vs. Isham*, *Ibid* 358. *Biddlesford vs. Onslow*, *Ibid* 209. The statute of *Gloucester*, 6 *Edw.* I, was subsequently passed on the same subject, which provides that "he which shall be attainted of waste shall lose the thing which he hath wasted, and shall moreover recompense thrice so much as the waste shall be taxed at." Lord *Coke's* commentary on this statute is similar to his commentary on the statute of *Marlbridge*. He says "the tenant shall by construction of law answer for the waste done by any stranger." He says also, that a *feme covert*, and an infant, shall answer for the waste done by a stranger. 2 *Inst.* 303. 1 *Inst.* 53, 54. 7 *Bac. Ab.* tit. *Waste*, (H 1.) 269, 270. An infant and a *feme covert* are destitute both of the moral and physical ability to prevent a stranger from doing waste. It is, therefore, no defence for a tenant to allege his own inability to have prevented the waste from being done. It was as much in the power of the defendant to have prevented the mob from doing the waste in this case, as it could be for an infant a day old to prevent a stranger from doing waste. A guardian is excepted out of the operation of the statute of *Gloucester*, for waste done by a stranger. The reason given by Lord *Coke* for this exception is, "that it is so penal unto him." Like other tenants he was not only to lose the place wasted and treble damages, but if convicted of waste he was, by the common law, to lose his wardship, a thing often of great value in those times. *Co. Litt.* 54. It appears also from a decision in 9 *Edw.* II, that if thieves burn the house of a tenant for life without evil keeping of the fire of lessee for life, the lessee shall not be punished therefor in an action of waste. It is impossible to devise upon what principle this case was decided, as the Year Book in which it is reported cannot be obtained. It is, however, of little consequence, as it is but an exception to the general rule, and does not embrace the case before the court, and *exceptio probat regulam*. *Brooke* in his *Abridgment*, tit *Waste*, pl. 15, says, that if waste is done by the King's enemies, the tenant is not answerable, but it is otherwise if done by traiterous subjects of the king. *Year Book*, 33 *Hen.* VI. The tenant is excused for the acts of God and public enemies, because he has no remedy over. 2 *Inst.* 145, 303. *Co. Litt.* 54. The tenant must either be liable for the acts of *all strangers*, (with the foregoing exceptions,) or for none. His liability cannot depend on the number of strangers concerned in doing the waste, or upon the degree of force used. If done without the tenant's knowledge or against his will, it can make no difference in principle whether the waste was done by one man or by five hundred. If the defendant is not liable for waste done by a stranger, he can plead it in bar. Will it be pretended that it is a good plea in bar for the defendant to say, the waste was done by a stranger? *Bull. N. P.* 119. *Vin. Ab.* tit. *Waste*, (K.) This law is founded on the soundest reason; for deplorable indeed would be the condition of lessors if such were

not the law. This liability of lessees is the only security lessors have against their collusion with strangers to do waste. The lessor, who is usually at a distance from the premises, often would not know who had committed the waste, and often would not even know, until long afterwards, that waste had been committed. If the tenant is not liable for the acts of strangers, he will have small inducement to be vigilant in preserving the premises committed to his charge. He will have still less inducement to incur the trouble and expense of a law suit to recover damages for waste after it has been committed; so that in point of fact the landlord would, in most cases, be remediless, and the wrongdoer go unpunished. So rigidly was the principle of law, upon which the plaintiff founds her claim, enforced under the statutes of *Marlbridge* and *Gloucester*, that tenants were made responsible for destruction done to the premises by fire communicated by accident or mischance; and so the law continued to be until the 6 *Anne*, *ch.* 31, which exempted tenants from liability for waste, occasioned by fire, without his default. *Pantam vs. Isham*, 1 *Salk.* 19. S. C. *Holt*, 9. *Countess of Salop vs. Crompton*, *Cro. Eliz.* 777. *Countess of Shrewsbury's* Case, 5 *Coke*, 14. *Attersoll vs. Stevens*, 1 *Taunt.* 183.

But were it admitted that a tenant for life or years is not responsible to the lessor for waste done to the premises, during his term, by a stranger, without default of the tenant, still the defendant in this case would be liable for the waste complained of. The defendant has been guilty of such a default—of such a misuser of the premises, as will make him answerable for the injury done to the house by the mob. The defendant rented the house as a dwelling-house for his family. The parties, at the time the contract was made, did not contemplate its being appropriated to any other purpose. The defendant afterwards used the house for the purpose of receiving therein *The Federal Republican* news-paper, and distributing the same to the subscribers. He knew at the time it was a very obnoxious paper, and it is proved that he had reason to believe the house would be attacked by a lawless multitude, if the paper was received and distributed therefrom; and that in consequence of these apprehensions, he collected a number of armed men in the house for the purpose of defending it. This was surely such a misuser of the premises as would make him responsible for all consequences upon the ground of his own default. Had the plaintiff supposed the house was to have been appropriated to that use, she would not have let it to the defendant, or if she had, she would have demanded an increased rent in proportion to the risk. A tenant has surely no right to convert a house, rented as a dwelling, into a garrison, at the risk of his landlord.

Upon either of the foregoing grounds, therefore, the plaintiff has an undoubted right of action against the defendant.

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2. As to the form of the action. The action of trespass on the case, in the nature of waste, has almost entirely superseded the old action of waste, which Serjeant *Williams*, in his notes to *Saunders*, says is now very seldom brought. Case is a far more convenient action to the plaintiff than waste. It is also more beneficial to the defendant, as it relieves him from the penal consequences of waste under the statute of *Gloucester*, the plaintiff recovering no more than the actual damage the premises have sustained *Greene vs. Cole*, 3 *Saund.* 252, *(note 7.) Jefferson vs. Jefferson*, 3 *Lev.* 181. *Pantam vs. Isham*, *Ibid* 358. *West vs. Treude*, *Cro. Car.* 187. *Countess of Salop vs. Crompton*, *Cro. Eliz.* 777, 784. *Countess of Shrewsbury's* case, 5 *Coke*, 14. It is decided in *Kinglyside vs. Thornton*, 2 *W. Blk. Rep.* 1111, that case in the nature of waste will lie, although the tenant has specially covenanted not to do waste. But it has been said, and will probably be said again, that this is permissive waste, and that case will not lie for permissive waste, upon the authority of *Gibson vs. Wells*, 4 *Bos. & Pull.* 290, and *Herne vs. Bembow*, 4 *Taunt.* 764. But this is voluntary and not permissive waste. Whether waste be voluntary or permissive, is to be ascertained by reference to the nature of the injury, and not to the intention of the tenant. If waste be produced by human volition, it is surely voluntary waste, whether the will of the tenant concurred in it or not. It will not be pretended that the waste complained of was not caused by human volition. It is then voluntary waste, according to the literal meaning of the words; and by construction of law it is voluntary waste in the defendant, as the law presumes he could have withstood it, *et qui non obstat quod obstare potest, facere videtur.* This is also voluntary waste, according to the definition of the books. 2 *Blk Com* 281. 3 *Blk. Com.* 223. 7 *Bac. Ab.* tit. *Waste*, 251. But admitting this to be permissive waste, case in the nature of waste is nevertheless the proper action to recover for it. *Williams*, in his notes to *Saunders*, says that case is now the usual action as well for *permissive* as voluntary waste. *Greene vs. Cole*, 3 *Saund.* 252, *(note 7.) Pomfret vs. Ricroft*, 1 *Saund*, 323, *(note 7.)* There can surely no reason be given why case should not lie as well for permissive as voluntary waste. The dictum of Sir *James Mansfield*, in *Gibson vs. Wells*, (and it is a mere dictum, for the point he assumed to decide was not before the court,) is entitled to very little respect. That was an action of trespass on the case, brought against *a tenant at will* for permissive waste. It is settled law that *case* will not lie against a tenant at will for any kind of waste. Trespass will lie against a tenant at will for voluntary waste, but *case* will not. *Countess of Shrewsbury's* case, 5 *Coke*, 14. *Countess of Salop vs. Crompton*, *Cro. Eliz.* 777. *Pantum vs. Isham*, 1 *Salk.* 19. Sir *James Mansfield* was not, therefore, called on to decide in that case, whether *case* would lie for permissive waste. His assertion was wholly *obiter*. The

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reason given for this opinion is not less singular than the opinion itself. He will not maintain the action, because if he did, "such an action might be maintained against a tenant at will, who omitted to repair a broken window." He ought to have known that such an action would not lie against a *tenant at will* for breaking a window, or even pulling down the house. But it seems Sir *James* would not support the action, lest some litigious spirit should avail himself of it to sue for a trifling, contemptible injury; or in other words, he would block up one of the great public highways leading to the temple of justice, lest if kept open, some querulous vagabond might travel on it. A very comprehensive reason this, and might with equal propriety be applied to every other action known to the law. If this action is denied to landlords for permissive waste, they have only to resort to the old action of waste, and recover treble damages, and that too for not repairing a broken window. In the *Countess of Shrewsbury's* case, the action was *case* for *permissive waste*, yet Lord *Coke* makes no objection to the form of action, on the ground of its being permissive waste. So in the case of *Countess of Salop vs. Crompton*, and in *Pantam vs. Isham*. The inference is therefore a strong one, that the judges did not conceive any objections could be made to the actions on that ground. In *Radcliff vs. D'Oyley*, 2 *T. R.* 630, it is expressly decided, that trespass on the case will lie for dilapidations suffered in a prebendal house by a prior incumbent. Dilapidations is permissive waste. The case of *Herne vs. Bembow* professes to adopt the principle decided in the *Countess of Shrewsbury's* case, but that case merely decides, that *case* will not lie against tenant at will for permissive waste. The case turns upon the character of the tenant, and not on the nature of the waste. It is, therefore, no authority, inasmuch as the court mistook the case they professed to be governed by. This is another of Sir *James Munsfield's* decisions. A declaration on a voluntary escape may be supported by proving a negligent escape. *Jones vs. Pope*, 1 *Saund.* 35, *(note* 1.*)*

Winder, for the Appellee. Much doubt exists as to the law upon the subject under discussion, if there is any force in the argument of the counsel for the appellant. What was the remedy which the landlord had against his tenant? If waste would not lie, then it must be admitted that this action cannot be sustained. There is no decided case where an action has been maintained against a tenant, where the damage, no matter in what manner, was occasioned by a force against his will. Lord *Coke* fell into a great mistake, and that he did fall into mistakes subsequent decisions show. He refers to *Brooke's Abridgment*, and the *Year Books;* and it can be shown that the earliest decisions are against him. In his 2 *Inst.* 145, 146, he says, that the statute of *Marlbridge* "prohibiteth that farmers shall not do waste, and yet if they suffer a stranger to do

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waste, they shall be charged with it," &c. "and that the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste; and that if the lessor should not have his action of waste, he should be without remedy." The same idea is repeated in several passages in *Co. Litt.* 53, b; 255, a. He lays it down, that whoever does the injury, the landlord has remedy for it against the tenant. It is not true that the landlord has no remedy against the person who committed the injury. If it can be shown that there is no adjudication upon which Lord *Coke* founds the dictum, then must the dictum be disregarded. It is shown both in *Jefferson vs. Jefferson*, and *Gibson vs. Wells*, that Lord *Coke* was mistaken, and that he meant that the lessor had no remedy by an action of waste; and in *Attersoll vs. Stevens* it is said, that all practice is against the dictum of Lord *Coke*. The reason of the law given by Lord *Coke* has failed. What is the remedy by a tenant against a wrongdoer? It is trespass; but he cannot recover for an injury done to the inheritance; he can only recover for the injury done to himself. If trees are cut down, he can only recover for the damages occasioned by depriving him of their shade, but not for the value of the trees. If the tenant is liable for waste committed by a stranger, he is liable for all the injury done to the freehold. Can it be said that a tenant, who has been obliged to abandon the premises by an overwhelming force, should be compelled to pay for the damages sustained? Is it reasonable that the landlord should recover of the tenant? Why should the tenant be answerable to the landlord more than any body else? He has nothing to do with the inheritance. He only acquires the rights of a tenant; all other rights remain in the landlord. No injury can be done to the one, without being done to the other. Is there then any reason that the tenant should be answerable, where he is injured, as well as the landlord? To give the remedy solely against the tenant, is to say that no one but the tenant can do an injury to the landlord. Suppose there are two persons, one holding in reversion, and the other in possession, is the tenant answerable to both for waste? In 22 *Vin Ab. tit. Waste*, the alteration made by the statute from what waste was at common law, is stated, and what was the remedy at common law, and how altered by the statute. At common law the tenant was not liable for waste committed by a stranger, but was made liable under the statutes; and that prohibition could only go to the tenant to prevent his doing waste—not that he should prevent others. The action of waste against a tenant was given by statute. Lord *Coke* seems to have derived his information from the Year Book, 33 *Hen.* VI, p. 1. where no decision appears to have been made. The only part that looks like a decision is, that if the marshall was negligent and did not keep a guard, then he shall be answerable for an escape; but if the escape was occasioned by fire, then he is not answerable. In *Bro.*

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Ab. tit. Waste, pl. 15, the case in 33 *Hen.* VI is cited, and the *dictum* is relied on, that if strange enemies destroy the house, waste does not lie, but it is otherwise by enemies, traitorous subjects of the King. This is the only authority upon which Lord *Coke* has founded his dictum, and this is no authority. In 1 *Co. Litt.* 53, b, § 57, *Fleta* is cited, and it is said that waste and destruction are convertible terms; that for all accidents over which the tenant had no control he was not liable; and he is not liable for losses occasioned by accidental fires. If thieves burn the house, the tenant is not liable. 2 *Inst.* 303. At common law a tenant was not liable for the acts of a stranger, and until the statute no recovery could be had against him for waste of any kind. Lord *Coke* did not even except the acts of the lessor himself; but said the tenant was liable in all cases, except in cases of injury by the act of God or the King's enemies. The true distinction is, that a tenant is only liable where he permits the waste, or might have prevented it, but did not do it, as it may be considered that he who gives permission to another to do an act, or may have prevented it, and would not, in fiction of law is supposed to have done the act. But for all accidents by fire, &c. the tenant is clearly excusable. If the tenant is not liable to the action of waste, then certainly he is not to the action on the case in the nature of waste. This action does not come in aid of the action of waste in all cases. That action is founded in technical fiction under the statute. The action on the case gives a remedy against the party who committed the injury, and to the extent of the injury, and may be brought by every person affected by the waste, against the tenant in possession or a stranger; but waste can only be brought by him that hath the immediate estate and inheritance in fee simple, or fee tail. 7 *Bac. Ab.* tit. *Waste*, (G) 263. 1 *Inst.* 53, b. 285, a. 3 *Saund* 252, b. *(note 7)*. 2 *Chitty's Plead.* 344, *(note q.) Ibid* 336. If the landlord and tenant can both bring their action against the wrongdoer for the same injury, where is the boasted rights spoken of by Lord *Coke*? On this principle the landlord could recover against a stranger, and so could the tenant—the landlord could recover against both tenant and wrongdoer, and the tenant recover also against the wrongdoer, who could not plead in bar any recovery against him by the landlord. There would then be a double recovery against him, and a double satisfaction for the same injury. Suppose the tenant commences his suit against a stranger immediately after the injury is sustained, and the landlord lies back—The tenant could only recover for the injury done his possession. He could not recover for any other injury until the landlord had recovered against him. Could the tenant bring a new action against the wrongdoer, and recover the amount which the landlord had recovered against him? Besides, limitations might bar the tenant's second action against the wrongdoer. All this shows how irrational the

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doctrine is which is contended for on the other side. But the hardships attending landlords, if they are compelled to resort to wrongdoers, has been urged. The hardships are as equally great on the part of tenants, and if either is to suffer, it ought to be the former. It is more reasonable that it should be the landlord, and not the tenant, who is to suffer. This action is not on the same grounds as the action of waste. It is founded on the real facts in the case, and gives a remedy against the wrongdoer. The court will probably be referred to the case of common carriers. With respect to them, and their liability, so is the law written, but with respect to tenants it is not so written. The liability of common carriers has been decided in numberless instances, and is well settled in the law. It is conceded that a tenant is answerable where he permits the waste; but it is denied that he is liable for that over which he had no control. There is no case in the books of an action on the case, in the nature of waste, against a tenant for injuries done by a stranger, over which the tenant had no control, and could not prevent, and did not permit. There is no case of such an action where the injury was by a third person, no matter how done. If in the lapse of 600 years there is no such case to be found, the inference is irresistable, that none such can be supported. This is a sufficient answer to every thing which has been or can be adduced upon the subject. In *Jefferson vs. Jefferson*, the action was against the tenant who did the injury. In *Biddlesford vs. Onslow*, the landlord sued the wrongdoing stranger. The defence set up there was, that the tenant should have brought the action, and not the landlord, for the overflowing and drowning wood, &c. But it was held that the landlord might recover for the injury done to the inheritance, and the tenant might sue for the damage done to his possession; that the tenant could not give a discharge against the damage done to the landlord. In *Pantam vs. Isham*, the landlord being seized of six stables, let one to the defendant, a tenant at will, and the rest to other persons for a term of years; by the negligence of the defendant in keeping his fire, it burned the plaintiff's stable, and also the defendant's, and the other five stables. It was held that no action lay against the defendant for the stable he took, but for the other stables an action would lie against him. This does not sanction the principle that the landlord can sue his tenant for an injury done by a stranger. *The Countess of Salop's* case was for negligence by the tenant, and it is not denied that the action was not well brought. But it does not affect the case before the court.

At all events, the tenant is not liable for *permissive waste*, and this is proved by the authorities before referred to. The consent of the tenant makes it *voluntary* waste, without such consent it is *permissive* waste. *Attersoll vs. Stevens*, 1 *Taunt*, 189, per *Chambre*, J. The facts show in this case that it was permissive waste; and this being

established, the action cannot be sustained. The precedents in *Chitty's Pleadings* are all for *voluntary* waste, and there are none against a tenant for *permissive* waste, because no such action will lie. *The Countess of Salop's* case, 5 *Coke*, 13. *Gibson vs. Wells*, 4 *Bos. & Pull.* 290. *Herne vs. Bembow*, 4 *Taunt.* 764. Tenants at will do not at this time exist in *England*. *Rob. on Frauds*, 244. *Clayton vs Blakely*, 8 *T. R.* 3. The declaration in this case is for commissive or voluntary waste, and the proof is that it was permissive waste. The action is founded on a *tort* on the part of the *tenant*, for which he is liable in this form of action for voluntary waste; but for permissive waste, it is no tort committed by the tenant, and the only remedy of the landlord is an action on the contract against the tenant for a violation of his engagement, for which an action of *assumpsit* would lie. *Herne vs. Bembow*, 4 *Taunt.* 764. But for a positive wrong against the landlord, then the tenant is a tort feasor, and may be sued in this form of action; but he cannot be called a tort feasor for acts done which he could not prevent and did not consent to.

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But if all the points urged are not sustainable, still the declaration does not set forth a case which is supported by the evidence, and therefore, the plaintiff cannot recover. It is said in 3 *Saund.* 252, b, (*note* 7.) that "it seems necessary in an action on the case, as well as in an action of waste, to state in the declaration the nature and kind of waste which is the subject of the action; and the plaintiff will not be permitted to give evidence of a different sort of waste from that which is laid in the declaration." Here the declaration charges commissive waste, and the proof is of permissive waste. There was no express agreement between the plaintiff and defendant, and the plaintiff cannot rely on the *implied assumpsit* and prove a tort. *Herne vs. Bembow.*

Pinkney, in reply. The general doctrine is established, that a tenant is liable to his landlord for waste committed on the premises in his possession by a stranger. This has been handed down to us by all the elementary writers, and the great sages of the law. But it has been said that the doctrine originated in the blunders of Lord *Coke*, in laying down the general doctrine of waste. He has not been accused of such blunder by any one but by the learned counsel of the appellee. It is not the doctrine of Lord *Coke* alone; it is to be found so stated by *Fitzherbert*, *Brooke* and *Moor*, and by all the abridgers of the law before Lord *Coke;* and it has been assumed as a principle which nobody denied, either before or since Lord *Coke*. He did not invent the doctrine, and would not speak of *femes covert*, and infants, as being answerable for waste committed by strangers, unless it was well settled. Mr. Justice *Heath*, in *Attersoll vs. Stevens*, recognizes the whole doctrine for which we contend. He lays it down as "com-

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mon learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor for all waste done on the land in lease, by whomsoever it may be committed." We cannot go amiss for the doctrine. *Brooke* and Lord *Coke* are sufficient authority for it. Without this right of the landlord to resort to his tenant, the law would be defective. It is like the case of a common carrier, founded upon great principles of public policy. If he is robbed upon the highway of money placed in his hands, he is answerable to the owner, because he had parted with his property. The reason of the law is equally applicable to a tenant. He is the bailee for the benefit of his landlord, who cannot protect himself against strangers, and the tenant is there to protect him. This case cannot be distinguished in principle from that of a common carrier, and the law is as well settled with respect to the former as it is to the latter. The tenant being in possession is presumed in the law to be able to prevent destruction to the premises. What is the presumption as to a common carrier? That he is able to protect the property in his possession. The presumption of law may be false, as it often is; and although the carrier may be obliged to submit to the force used, yet the law completes his liability. It is so as to a tenant; and it is as reasonable in the one case as it is in the other. It is for the great benefit of public justice; and although the rule may militate against moral justice, and it often does, yet a court of equity can give no relief. The liability of a tenant for the acts of strangers, is upon the ground that he has power to prevent them; and he who has power, though constructive, and does not exercise it, is considered as doing that which is done. So is a tenant in dower and by the curtesy liable for the acts of strangers, upon the ground that they had the power to prevent them, and not preventing them are considered as doing them themselves. If a common carrier is robbed, he is considered in the law as if robbed by himself. This is the same kind of action as that against a common carrier, who is considered, by construction of law, of being guilty of robbing himself, even where the robbery is committed by a force which he cannot resist. If a mob assails a gaol, breaks it open, and lets out the prisoners and debtors, still the gaoler is liable. Has the gaoler such an armed force as would prevent it? He is found in an unarmed state, and cannot resist the force. Is the sheriff answerable? Whoever doubted it? The responsibility stands upon the same principles which govern as to tenants and common carriers. The new fangled notions of justice are, that he did every thing in his power to prevent the act, and therefore must be excused. But the law presumes he had the power to prevent the act, and although in fact he had it not, yet he is liable for the consequences. There are several modern decisions, which go to fortify the doctrine we contend for, and the right of the tenant to recover over against the wrong doer. 7 *Bac. Ab.* tit. *Waste.* The te-

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nant has complete remedy with reference to his own and his landlord's injuries; as in the case of a common carrier, where the owner may pass by the carrier and sue the hundred, and recover the value of the goods of which the carrier is robbed, or the carrier may sue the hundred. The two cases are precisely analogous, and the tenant, or common carrier, may sue the wrongdoer without waiting to see whether the landlord or owner of the goods will sue. The remedy for waste was not merely preventive by a writ of *Estrepement*, or prohibition *pendente placito*, but it was also corrective by a writ of waste against the tenant, founded partly upon the common law, and partly upon the statute of *Gloucester. Blk. Com.* 225. But it has been urged that accidental destruction of the premises by fire excused the tenant, and *Fleta*, liber 1, *ch.* 11, has been referred to. But *Fleta* means fire by lightning from Heaven—the act of God. It has never been decided that the tenant was not liable in the case of the destruction of the premises by fire, unless it was fire occasioned by lightning. If fire in every case was an excuse to the tenant, why was the statute of *Anne* passed? Why were strangers made liable in the case of fire, and the tenant not? There are only two exceptions—where the injury is done by the king's enemies and by the act of God. Waste is not an action which the law discountenances. It was interpreted an equitable action. Under the statute which enabled tenants in common to bring actions of waste, joint tenants were considered as included. The statutes of waste were favourites of courts of judicature. But where the house of the tenant is burnt by thieves in the night, the tenant, it is said, was not responsible. That, however, is not similar to the present case. Admit that where there was no negligence on the part of the tenant, he is not liable. The defendant here is not in that situation. Was he free from negligence? He was aware of the mob, and introduced armed men into the house. What was the legal effect of this act of his? He rented a house as a dwelling, and appropriates it to another purpose. He is aware of the consequences, and converts the house into a fortress. He provides means of defence, and it is he who provokes the attack. He, therefore, is answerable for the consequences. He is *in delicto*. If the cases then turned upon the fact of negligence or not, as contended by the defendant's counsel, the defendant is certainly answerable. Go to the case of a common carrier—He is exempted by the act of God—If his bark is overset, he is excused; but suppose in a violent tempest he puts to sea, and is upset, is he not answerable? Surely he is, and it is in vain for him to rely upon the act of God as an excuse. *Forward vs. Pittard*, 1 *T. R.* 27. *Colt vs. M'Mechen*, 6 *Johns. Rep.* 160. Here the tenant, instead of retreating, provides the means of resistance. This is such conduct as would make him answerable, and is strictly within the case cited from *Co. Litt.* and that of a common-carrier. The only exception which has been

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relied on, is one which, under its qualification, goes to defeat the defence set up by the defendant. In all cases where there is no fault, then the tenant is not liable, is what the counsel for the appellee contends for; but he did not show that the defendant did no act to occasion the destruction of the house. The true rule, the counsel says, is that where the tenant connives at the injury, he shall be made to answer for the damage. And yet that would be a case where he could not sue the wrongdoer, because that would be to sue himself. He is a constructive participator in the waste. If he stands by and permits the injury, it is his own act; there is no occasion for authorities to prove this. The cases where there is a constructive power to repel the force, is that to which the law refers. It must be that the tenant is liable in every case, except as to the King's enemies, or that he is not answerable at all. Were it so that tenants were not liable, what innumerable frauds would be practised. Tenants would commit injuries, and charge them upon strangers. Permissive or negligent waste is just as much within the statute as any other waste. If permissive waste is excluded from the statute, then there is hardly any waste upon which the statute can operate. The form of the writ of waste shows conclusively, that all sorts of permissive waste was covered by the statute. If the case of fire ever did form an exception out of the law, it was for a reason which has no sort of application to the present case, except as it applies to negligence. But it is said, that the action on the case can only lie against the actual doer of the wrong. There has been no authority cited to prove this position. But the case of a common-carrier shows that this action lies against the common-carrier for an act done by a stranger—a robber. How can it be said then that no such action can be sustained against a tenant for injuries done to the premises by a stranger? The common-carrier is sued upon the ground of contract. So when a tenant enters into possession, he is bound to protect the premises, and the law constructively makes him adequate to protect them. The action against the common-carrier, and the action against the tenant, both charge constructive negligence. They are both *assumpsit*—both originating in contract. The action on the case is to be suited to the case as the action imports. How can it be said that it cannot be maintained when it is suited to the case? It was invented for the purpose of being suited to every man's case. It is a substitute for the old common law remedies, and has been applied to cases where waste would not apply. All the common law remedies were shackled, and this action was introduced to unshackle those remedies. This action lies for a *nuisance*, and a remedy is given to a tenant for years with respect to a right of common. He might elect certain specific remedies, and be restored if he succeeded. This action is substituted in the place of *Novel Disseisin*, and is given where before it could not be brought. The legal rights of the parties are inquired into,

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and if he had a right under the common law, then he may maintain this action. The court first decides what is lawful before they inquire whether it is equitable or not. Here they must take it as it stands, and are not to inquire whether it is equitable or not that the defendant should be made liable. But the justice of the case is with the plaintiff, and the record need only to be looked at to be so considered. It was a wrong committed against the plaintiff, to which she was no party, and in a legal point of view the injury originated by the misconduct of the defendant. There is no equitable principle which would not fix the defendant, and make him liable. It has been asked how the tenant was to recover against the wrongdoer? The answer to this is given in *Co. Litt.* 57, a. *(note* 2,) where it is said that both the landlord and tenant can bring an action against the stranger to recover their particular interest; and so may the tenant bring the action to recover for himself and the landlord. *Ibid (note* 4.) The tenant may have either trespass or an action on the case, because he is answerable over in waste. He may sustain an action because he is liable to his landlord. At any rate it cannot be that if the landlord recovers of the wrongdoer, that the tenant can also recover of him for the same injury. There can be no such absurdity as a double recovery. But if the tenant recovers only to the extent of his right, there is nothing to prevent the landlord from recovering to the extent of his interest; and if the tenant recovered to the extent of his own and the landlord's interest, then the landlord must resort to the tenant alone. The tenant is liable to the landlord in the first instance, and the landlord may resort to either the tenant or the stranger, but he cannot recover against both. But it has been urged, that the waste charged in the declaration is not voluntary, but permissive waste, and that the action does not lie for a permissive waste, if it does for a voluntary waste. We deny that this is permissive waste, but if it is, the action lies for it. There are two kinds of waste—1st. *Voluntary* or *actual.* 2d. *Permissive* or *negligent.* Voluntary waste is by the tenant himself, or by his servants, or by strangers, for which, in construction of law, he is liable Permissive waste is suffering the thing to go to destruction by the ordinary operations of time, and not by the act of man. Voluntary waste is attributable to man, and is the result of volition. The whole affair is a mere construction of law, and has nothing to do with the fact. It is admitted that a tenant is answerable for voluntary waste. It must be voluntary or actual, instead of permissive, having reference to human action. The court here are not driven to the conclusion of construing this to be permissive waste. Where the law by construction connects the man with the act, he is compelled to adopt it as his own act. The books have defined permissive waste more particularly than other kind of waste. It is for the consideration of the court upon principle looking to the reason of the thing. We con-

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sider it to be voluntary waste, but there is no direct authority upon the subject. If it is voluntary waste, and there is nothing to prevent this court from so considering it, then the defendant is concluded. But an action on the case may be brought for permissive as well as voluntary waste, and the plaintiff is not bound to count upon it as permissive waste. It is not said that this action does not lie for the waste complained of, as permissive waste, but it is contended that it will not lie for permissive waste at all. There is no reason why it should not. At common law the door was opened to all kinds of waste, whether voluntary or permissive; and with respect to tenants for life or years there was no distinction as to the nature of the waste. By permitting a remedy for voluntary waste, it was permitted for permissive waste; and in the opinion of the ancient law writers there was no distinction; nor was there any distinction taken by the makers of the statute of *Gloucester*. If it is not in the common law, before the statute, where are we to search for it? If this is a proper action for voluntary waste, why is it not for permissive waste? Is the tenant's permitting the premises to go to ruin, to exempt him from liability for the injury? It is more natural that this action should lie for permissive than for voluntary waste; because for a voluntary waste, by strangers out of possession, an action of trespass *vi et armis* would lie. Is there any reason for excluding permissive waste with regard to the landlord or tenant? In the action of waste the tenant is liable for both kinds of waste. He was liable to treble damages, and the loss of the place on which the waste was committed. The change of action was to administer actual justice between the parties; and this action was received with open arms in the place of the action of waste. Why reject it then as applicable to permissive waste? If it is applicable to voluntary waste, it is more so to permissive waste. Is it not for the benefit of the tenant to substitute this for the action of waste? It surely must be; and it is for the benefit of both landlord and tenant. Why drive the plaintiff to an antiquated action when more justice may be done in the present action? To prove that this action may be sustained, nothing more is necessary than to prove it will lie for voluntary waste. It may be shown that it has been the usage to recover for permissive waste. In *Gibson vs. Wells*, the reasons assigned by the chief justice stopped the further progress of the cause—that if the action was maintainable it might be brought against a tenant at will who omitted to repair a broken window. No action would lie either for waste, or on the case in the nature of waste, against a *tenant at will*. The opinion of the chief justice is that he might be answerable in an action of waste, but not in action on the case. This opinion is founded upon two reasons not only ridiculous, but false. Was it not better to bring this action for the small waste spoken of by the judge, than to bring the action of waste? What sort of reasoning then is that of the judge to

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establish a distinction calculated to compel landlords to do that which was inconsistent with mercy? And although on the trial of the above cause, several precedents were referred to showing declarations for permissive waste, similar to that before the court, but as counts for waste wilfully committed had been joined, and that no express decision had been given on the point in question, the court adhered to their opinion. If there had been no express decision, there was practice, and that was sufficient. There was a time when practice was the first introduction of the law. Look at the opinions of the Serjeants of the Law—they are entitled to the highest respect, and adopted as the law. Precedents settled by counsel are admitted as evidence of the law, although formed without authority. In the precedents referred to, it is said that counts for permissive waste were joined with counts for waste wilfully committed; if the count for permissive waste was a bad one, it corrupted the good counts, and would have been reversed if a judgment had been rendered thereon; and never having been reversed, and although passed *sub silentio*, it is strong evidence of what the law is. It showed the opinion not only of the counsel who brought the actions, but of the counsel who defended the cases. The case of *Gibson vs. Wells* has been principally relied on by the counsel on the other side. He also relies on *Herne vs Bembow*, where the same tribunal reiterated the same principle, that an action on the case would not lie against a tenant for permissive waste, but that *assumpsit* should have been brought—which was inventing a new form of action on an implied *assumpsit*. And the court said that this form of action could not be brought, because it sounded in tort. There are many cases of *assumpsit* founded on tort. The court cited the *Countess of Shrewsbury's* case, *5 Coke*, 14, and the reasons given in that case do not justify the decision in *Herne vs. Bembow*. We wish no better authority than Lord *Coke*. We have the opinion also of Sergeant *Williams*, and every writer upon special pleading, that this action may be maintained against a tenant for permissive waste, and there was no suggestion to the contrary until that made by Sir *James Mansfield*. It is said so in *Pantam vs. Isham*, where it was shown to be the settled law, that permissive waste would lie against a tenant for life, or for years. But it is said, that if the waste complained of is permissive waste, it must be counted upon as such—and that here the *allegata* and *probata* do not agree. There is no authority to show that if you go for permissive waste, you must lay it as permissive waste. There is no doubt but you may go for permissive waste, and lay it for voluntary waste. What was the plea at common law? *There was no waste. Non fecit vastum*; and this for permissive as well as for voluntary waste. There was but one form of a declaration in waste. The count followed the writ, and the plea followed the count. If it was so at common law, and this action is substituted for the action of waste, nothing more need

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be alleged in the one than in the other; and no reason can be given why it should. There was as much necessity that it should be stated in the declaration in an action of waste, that it was for permissive waste, as it is that it should be so stated in this action. Precedents showing a count for permissive waste, are not conclusive that it was absolutely necessary. In 3 *Saund.* 252, d, *(note,)* it is not said that if you go for voluntary waste you cannot give in evidence permissive waste, the latter being included in the former, whereas the former may not be included in the latter. The statute of *Gloucester* embraced permissive within the description of voluntary waste. If the common law made a person who committed permissive waste, as included within that of commissive waste, then the admission of this action, as a substitute for the old action of waste, has the same effect. If it was included in the one, it is included in the other. But here the *first* count is sufficient without the aid of the second. In *Govett vs. Badnidge*, 3 *East*, 62, which was an action partly on contract, and partly on tort, and it was held that the gist of the action was *tort*, and not the *contract* out of which it arose.

Buchanan, J. delivered the opinion of the Court, dissenting from the opinion of the court below in the *second* bill of exceptions.

Johnson, J. The action in this case was brought in *Baltimore* county court, to recover damages for *a dwelling-house* on *Charles* street, in the city of *Baltimore*, which was materially injured during the time it was let by the plaintiff to the defendant.

The facts as they present themselves on the bill of exceptions are: (He here stated the case.)

The declaration contains two counts, the one an action on the case in the nature of waste, the other on an implied undertaking to restore the property in good tenantable repair, alleging as the breach the destruction of the property by the defendant.

Actions of the present nature have been seldom if ever brought in this state; indeed a transaction similar to the present never before, and it is greatly to be deplored ever did, and it is hoped never will arise again, in which *private property* has been by force destroyed against the exertions of the civil authority, collected on the spur of the occasion for its preservation. But as the property has been destroyed, as between the landlord and tenant, the question is who must bear the burden of the loss?

In forming an opinion on the present subject it is not necessary to trace the law of waste, as it existed at common law, or as changed by the statutes of *Marlbridge* and of *Gloucester;* it is sufficient to observe, that those statutes make a *lessee for years* liable to the action of waste, in which when determined against the tenant, he forfeited the place wasted, and was compelled to pay treble damages.

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Waste, *vastum*, is a spoil or destruction in houses, &c. to the disherison of him that hath the remainder or reversion in fee simple or fee tail. The removing wainscot floors, or other things once fixed to the freehold, is waste. *Co. Litt.* 53. 4 *Rep.* 64. 2 *Blk.* 281.

Waste is *voluntary*, a crime of commission, as *pulling* down a house; or *permissive*, which is matter of *omission* only, as by suffering it to fall for necessary repairs.

If the property in question had been destroyed, as set forth in the plaintiff's claim, by the *defendant himself*, or by others at *his instance*, it is clear he made himself liable to an action of waste; wherein not only would have been recovered the house let, (supposing the lease not expired,) but treble damages. The injury done to the property would have assumed the denomination of *wilful waste*. But as the destruction was not, in the common acceptation of the term, made by himself, or by others at his instance, is he liable?

It is not novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss, or for injuries done to it, which the possessor could not restrain.

The common carrier, the inn-keeper, the sheriff, and others not thought material to enumerate, are responsible for losses which they could not prevent. They stand liable to the owner for all losses, whether sustained by highway robbers, or others, no matter how *incontrollable* and *irresistible* may be the force with which they are assailed. The act of God, and of the public enemies, will only free them from the demand, when the loss proceeded from such act or such enemies, and then only when they are free from every exception.

If the law was otherwise, by conniving with the robbers and thieves, no property could be safe in their custody; it would scarcely ever be in the owner's power to ascertain whether the loss was the result of concert, or of force—whether the alleged attack might or might not have been resisted. To free them from all temptation to swerve from their duty, and to secure an effectual remedy to those who intrust them with their property, all excuses of the kind spoken of are precluded; for it is better that, occasionally, the loss should fall on an innocent person, *than* to relax, and in effect, to defeat all liability.

At the common law all such as were liable to the action of waste, no matter what might be their situation, no matter what might be the power to repel the waste from being done, if it was committed, they were bound to respond. The infant age of the tenant would not free him from the responsibility. Under the statutes of *Marlbridge* and *Gloucester*, the same liabilities are cast on the tenant for years.

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The defendant, in the case before the court, comes within the purview of those statutes, and must therefore be responsible, unless the overwhelming force, by which the injury was done, exonerates him.

As the property of the landlord is placed in the tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it, when committed, as in most instances it would be impossible for the landlord to ascertain in time, or come at the wrongdoer, it appears to have been the policy of the law, to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God, or of the King's enemies. But let it, for argument's sake, be conceded, that if the defendant had continued to use the house for the purpose it was let to him, and that whilst so used, the lawless multitude attacked and destroyed it, that he would not have been liable, *a point not necessary to be determined in this case*; yet as *he* did of his *own authority, without the consent of the plaintiff*, divert the house to a totally different and much more dangerous purpose, well aware of the risk which the property would thereby have to encounter, on principles of law and justice, as between him and the plaintiff, he becomes responsible for the consequences.

If the common carrier, who puts to sea during a storm, or on its approaching, cannot exonerate himself from the loss the storm may produce, which he attempted to buffet, so it appears equally just that a *tenant*, who applies the property to a different purpose than it was let to him, aware of the great increase of risk, in consequence of such diversion, *must bear*, and not *cast* the responsibility on the landlord. My opinion, therefore, is, that on principles of law and justice, the merits of the case are with the plaintiff.

The action of waste appears to have given way to, or been superseded by, the action on the case in *nature of waste*, which is the first count in the present declaration. Two grounds have been relied on against the first count:

1st. That the evidence does not support the count; and

2d. That if the defendant was liable, yet as the *waste was permissive*, and not *voluntary*, an action on the case, in the nature of waste, will not lie.

The declaration, it is true, states the destruction of the property to have been made by the defendant, and by those taken into the house by him.

In common parlance a person cannot be said to have done an act which was done by another; nor can he be charged with causing a destruction to take place when every exertion in his power was used to prevent it. But in the legal acceptation of the charge, he who does certain acts, by others, is said to have done them himself. *Qui facit per alium facit per se.* If the tenant is *generally* responsible for *all* waste committed by strangers, no matter how overwhelming the power, how much more strong is the case

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before the court, when the property in question was applied to a different object than that for which it was let; the defendant having reason to believe that in consequence of such application "the house would be attacked by a lawless armed and unknown multitude"—As, between the plaintiff and defendant, the acts of the multitude produced by the acts of the defendant and those in concert with him, must be imputable to the defendant himself, and of course the charge, as contained in the count, is correct.

The second objection to the count by the preceding reasoning is also removed; for, if the defendant is to be liable as of himself, for the waste committed by the lawless multitude, then it follows that the destruction to the property in question, comes strictly under the denomination of *voluntary* waste, for which, no doubt is entertained but that the present action is applicable It would then appear that there is no need to form an opinion, whether the action on the case, in the nature of waste, will, or will not lie for permissive waste; but the inclination of my mind is, that that action will be sustained as well for the one as for the other description of waste. It is a form of action, long since introduced, to recover for such injuries; it is an equitable action, and ought not to be discountenanced; it confines the recovery to the real loss sustained; and I see no reason to say that it will not lie in *all cases*, and against *all* persons, who are at common law, or under the statutes of *Marlbridge* and *Gloucester*, made *liable to the action of waste.*

As the case is covered by the first count in the declaration, I deem it totally unnecessary to add whether the evidence sustains the second.

The opinion of the court below, as pronounced on the second bill of exceptions is erroneous, and the judgment obtained in consequence thereof is reversed.

MARTIN, J. dissented.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

FISHWICK'S Adm'r. vs. SEWELL.

JUNE.

In an action of trover, brought by an administrator for the conversion of certain negro slaves, the declaration stated that J F, the intestate, died possessed of a negro woman named *Dinah*, in 1765; that *Dinah* and her issue came to the possession of the defendant, and that administration was granted to the plaintiff on the estate of J F in 1812. The county court directed the jury, that from the evidence in the cause, if they found it to be true, they might and ought to presume, that if *Dinah* ever was the property of J F, she was legally transferred to the defendant, or those under whom he claimed. On appeal—*Held*, that such evidence was sufficient to account for the delay which took place before the issuing the letters of administration to the plaintiff, and to repel the presumption that *Dinah* was legally transferred to the defendant, or those under whom he claimed.

No right of action vested in any person to sustain an action of trover for *Dinah*, and her descendants, before letters of administration were granted to the plaintiff The act of limitations could not begin to operate before such letters were taken out, and did not attach until demand and refusal.

An additional account returned to the prerogative court in 1765 by R D, (under whom the defendant claimed *Dinah* and her issue,) who had intermarried with the mother of J F, and who was the executrix of the father of J F, certified by the register of wills under seal, permitted to be read in evidence.

APPEAL from *Prince George's* County Court. An action of trover was brought on the 15th of June 1812, for the

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value of certain negro slaves, and a spinet. The declaration contained two counts. The *first* stated, that *Jane Fishwick*, in her life-time, on the 1st of January 1765, was possessed of the following negroes, to wit: *Dinah*, of the price of $300; *Fanny*, of, &c. [*Enumerating 17 other negroes, and their prices.*] And also one spinet of the value of, &c. as of her own proper goods and chattels; and being so possessed thereof, afterwards, on the 1st of March in the said year, died intestate; after whose death the said property came to the hands and possession of the defendant, (now appellee.) And afterwards on the 6th of May 1812, administration of all and singular the goods, &c. which were of the said *Jane* at the time of her death, was by the Orphans Court of *Prince George's* county aforesaid, in due form of law granted to the plaintiff, (now appellant;) and the defendant, although he very well knew the said property was the property of the said *Jane* in her life-time, and at the time of her death, and of right to belong to the plaintiff after the decease of the said *Jane*, by reason of said administration, nevertheless converting, &c. [Setting out the demand and conversion, &c.] The *second count* stated, that the said *Jane* in her life-time, to wit, on the 1st of January 1765, was also possessed of the following property, to wit, a negro woman named *Dinah*, of the price of, &c. and a negro woman named *Fanny*, of, &c. as of her own proper goods and chattels; and being so possessed thereof, afterwards, to wit, on the 1st of March in the last mentioned year, departed this life intestate. And whereas the said *Dinah*, after the death of the said *Jane*, and before the granting of any letters of administration to the plaintiff, had issue, to wit, *Phillis*, of the price of, &c. which said negroes named *Phillis*, &c. the proper goods and chattels of the said *Jane*, together with the said *Dinah* and *Fanny*, came into the hands and possession of the defendant after the death of the said *Jane*. And afterwards, &c. [Setting out the administration granted to the plaintiff, the demand and conversion, &c.] The defendant pleaded not guilty, and not guilty within three years, &c. At the trial in the county court at April term 1814, the plaintiff, to prove property in the negroes mentioned in the declaration, offered in evidence the depositions of sundry witnesses, which it was agreed between the parties should be read in evidence, so far as they were competent and legal testimony. 1. *Eleanor Clagett.* She deposed that she knew *Jane Fishwick*, and that she lived in the family of *Robert Darnall*, deceased, and the deponent believed died there; that she saw her there when she was sick, a few days before her death. She knew a female slave named *Dinah*, said to be in the possession of the defendant. That *Dinah* was called and considered by the family of the late *R. Darnall* the servant of Miss *Fishwick*, and she waited on her in her room as her servant, but how or in what manner she claimed or owned the said servant, the deponent did not know. That she

Where the evidence and length of time did not warrant the presumption that R D, with the assent of the persons entitled to distribution of the estate of J F, took upon himself the executorship, and fully administered all the assets of J F, by paying debts, &c. to the value of such assets

The plaintiff is entitled to recover damages to the amount of the value of *Dinah*, and her descendants, together with damages for the detention from the time of the demand and refusal proved

Certain facts declared to be inadmissible as evidence, the direct tendency of which was to impeach and nullify the letters of administration granted to the plaintiff, by showing that they were not granted by the Orphans court, but by a deputy clerk in the office of the register of wills, to whom the court could not delegate any such authority—*Held*, that such letters were legally efficient, until revoked, being clothed with all the requisite legal solemnities to communicate power and authority to the plaintiff to administer on the estate of J F.

Held also, that a claim against the estate of J F, paid by R D, could not be recouped from the damages for the conversion of the negroes claimed by the plaintiff

A trustee cannot avail himself of the act of limitations against his *cestui que trust.*

was intimate in the family of *R. Darnall.* That she was not with Miss *Fishwick* at the time of her death, and knew nothing in regard to her funeral expenses. 2. *Hannah West.* She deposed that she knew a female slave named *Dinah*, in the possession of the defendant. She did not know who was the owner of *Dinah*, but she came over from the *Eastern Shore* with *R. Darnall.* and his wife. That Miss *Fishwick* lived with *R. Darnall*, deceased, and died at his house. 3. Doctor *William Beanes.* He deposed that he was acquainted with Miss *Fishwick* when she was from the age of 12 or 13 years, to about 20 years or upwards; she resided with *Robert Darnall* and wife, and was upwards of twenty years of age when she died, which was about the year 1775. He knew negro *Dinah* who resided in the family of *R. Darnall.* Since Miss *Fishwick's* death he heard it frequently said, and probably in the family, that *Dinah* was the slave of Miss *Fishwick.* To the best of his recollection he had heard the defendant say that Mr. *Darnall* had written to Mr. *Muir* to take the property, and pay the debts due from Miss *Fishwick*, stating that the debts due to Mr. *Darnall* were more than the value of the property, but that he received no answer from Mr. *Muir.* He never heard of any other property, but negro *Dinah*, in *Darnall's* possession, that belonged to Miss *Fishwick;* that he held her as his own. The deponent's inference, from his casual conversation with the defendant, the very words and particulars of which he could not recollect, was that the defendant claimed her on account of the debts due Mr. *Darnall* from Miss *Fishwick.* That from a conversation he had with the defendant, the defendant informed him, that Mr *Darnall*, when he heard that some claim was set up by Mrs. *Hepburn* to negro *Dinah*, told him that probably some claim might be set up after his death, that he had as much right to negro *Dinah* as to any other property on his plantation, without stating any reason or foundation for the claim. This deponent further saith, that Miss *Fishwick* was the daughter of Mrs. *Darnall;* that Miss *Fishwick* had no brother or sister of the whole blood, but a half brother, a Mr. *Nevitt*, the father of a Mrs. *Steele*, and two half sisters, Mrs. *Green* and Mrs. *Muir*, who were older than Miss *Fishwick*, but the deponent did not know whether they were living or not at the time of Miss *Fishwick's* death. That he was not intimate in the family of Mr. *Darnall* until after the death of Miss *Fishwick.* He never heard the defendant say or pretend that Miss *Fishwick* gave *Dinah* to Mr. *Darnall* or her mother. The inference he drew from the conversations he had with the defendant, was that the claim of Mr. *Darnall* was founded on what Mr. *Darnall* claimed from Miss *Fishwick*, but he never heard positively on what ground, Mr. *Darnall*, or the defendant, claimed *Dinah.* That ever since he knew *Dinah*, during the life of Mr. *Darnall*, she was held by him as his property; and she, and her descendants, have

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been in the possession of the defendant, and held by him as his property, ever since the death of Mr. *Darnall*. He has heard that Mr. *Darnall* acquired considerable property by his intermarriage with Mrs. *Darnall*. 4. *Richard Burgess*. He deposed, that at the request of the plaintiff he delivered the defendant a written demand for sundry negroes, claimed by the plaintiff as administrator of Miss *Fishwick*, in the possession of the defendant, of which a copy of a letter, now shewn to him, was a true copy, dated the 15th of June 1812, among which negroes was a negro woman by the name of *Dinah*, who he thinks the defendant said was the mother or grand-mother of all the others claimed, except one, and which the deponent believes was a female, whose name he does not now recollect. That the defendant refused to deliver said negroes, and denied all claim that the plaintiff had thereto. That the defendant, at the same time desired him to tell the plaintiff that he had no property of Miss *Fishwick's* in his hands. The plaintiff also produced as a witness Dr. *William Hill*, who deposed that the defendant had declared to him, (during conversations he had about the claim set up by the *Hepburns* in right of Miss *Fishwick* to the negro woman *Dinah*,) that the said *Hepburns* had been talking about and claiming *Dinah* a long while; that his uncle, meaning *Robert Darnall*, had a claim against the plaintiff's intestate; but the witness had never heard the defendant say that negro *Dinah*, in the declaration mentioned, was the property of the plaintiff's intestate: and that the defendant also said, in conversations about the claim of the *Hepburns* to *Dinah*, that his uncle *Robert Darnall* had claims against the estate of Miss *Fishwick* which would cover the whole of the property left by her. That the *Hepburns* had no right to *Dinah*, but even if they had a right to her it was barred by the statute of limitations. That the defendant had told the witness that a certain *Samuel J. Coolidge*, who had intermarried with the daughter of Mrs. *Jane Hepburn*, one of the legal representatives of the plaintiff's intestate, had set up a claim to negro *Dinah*, and her descendants, and that a claim had also been set up by the said *Jane Hepburn* some years since, but that they had no title; and that *Coolidge* told the witness that he had thoughts of instituting a suit against the defendant, but he found he could not substantiate his claim, and besides, the property, if recovered, would be divided amongst so many that it was not of much consequence. The plaintiff also proved, by a competent witness, that negro *Dinah*, mentioned in the declaration, had seven children, to wit, *Fanny*, *Patt*, &c. named in the declaration, all of whom were living, and were born after the death of the plaintiff's intestate; that *John*, &c. are the children of *Fanny*; that *Isaac*, *Nancy*, &c. are the children of *Patt*; and that *Harriott* is the daughter of *Nancy*, who is deceased, and who was the daughter of *Dinah*. The plaintiff also offered in evidence, by the

aforesaid *Richard Burgess*, that he the witness called on the defendant, and by the following letter from the plaintiff to the defendant, dated the 15th of June 1812, demanded the negroes mentioned in the declaration, viz. "I am authorized by the orphans court of *Prince-George's* county, as administrator of Miss *Jane Fishwick*, late of said county, deceased, to ask and demand of you her personal estate, consisting of the following property, to wit. *Dinah*, *Fanny*, *Phillis*, *John*, *Paul*, *Moses*, *Susannah*, *Pat*, *Isaac*, *Charles*, *Nelly*, *Sally*, *John*, *Sampson*, *Tom*, *Nancy*, *Kit*, *Anna* and *Harriott*, and one spinet, and any other property which you may have in your possession belonging to said Miss *Fishwick*, and to inform me by Mr. *Richard Burgess* in writing, whether you will deliver them, and if not, your reasons for detaining them." Among which negroes was negro *Dinah*, whom the witness thinks the defendant said was the mother or grandmother of all the others claimed, except one, which the witness believed was a female, but her name he did not recollect. That the defendant refused to deliver said negroes, and denied all claim that the plaintiff had thereto. That the defendant, at the same time desired the witness to tell the plaintiff that he had no property of Miss *Fishwick's* in his hands. The witness did not recollect that the defendant told him that he had an account against Miss *Fishwick* which would swallow up the whole of the estate left by her in his possession. That the defendant said, (speaking on the subject of his claim.) that the expenses of the funeral would amount to more than the value of the property. The plaintiff also offered in evidence by *John Smith Brookes*, who deposed that *Samuel Hepburn*, the father of the plaintiff, was born and lived all his life in the neighbourhood of *Robert Darnall's* residence in *Prince-George's* county, and was one of the commissioners of the tax for said county, and also clerk to the commissioners of the tax at the time that *Darnall* was one of the commissioners. That Mrs. *Darnall*, at the time of her marriage with Mr. *Darnall*, was much older than he was, and was reputed very rich, and it was generally believed that he had acquired considerable property by the marriage. That Mr. *Darnall* had no children by Mrs. *Darnall*. That Mr. *Coolidge* married a sister of the plaintiff, a daughter of *Jane Hepburn*, (who is yet living,) who was married between the age of eighteen and twenty one years, and resided in *Prince-George's* county from the time of her marriage until one or two years ago. That *Samuel Hepburn*, died seven or eight years ago. It was proved by the records of the commissioners of the tax for *Prince-George's* county, that *Samuel Hepburn*, stated to have married *Jane Hepburn*, (who was the daughter of Mrs. *Muir*, who was proved by Doctor *Beanes*, in his deposition, to have been one of the half sisters of *Jane Fishwick*,) was a commissioner of the tax for the said county, from the year 1786 till 1789, and acted as such; and from 1790 until his death, was the clerk

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to the commissioners of the tax for said county, and acted as such. The defendant proved by *Joshua Peake*, a witness produced and sworn by the plaintiff, that he the witness was overseer for *Robert Darnall* seventeen years ago, and continued his overseer until his death, which happened in 1803, and that he has ever since been acting as overseer for the defendant, to whom the said *Darnall*, by his will devised the estate superintended by the witness; that when he went upon the farm, *Dinah*, and such of her descendants before named as were born, were on the farm, were considered the negroes of said *Darnall*, were claimed and used by him as his own property, and continued in his use and possession until his death; that until his death they were assessed to said *Darnall*, who paid the county charges on them; and all of said negroes that were born before the death of *Darnall* were always considered, claimed and used by him as his own property. That upon the death of *Darnall*, those negroes were taken possession of by the defendant as his property, claiming the same under the will of *Darnall*, and the defendant has ever since had the use and undisturbed possession of the negroes, and of all their issue born since the death of *Darnall*. That ever since the death of the latter the whole of the negroes have been assessed to, and the taxes paid by the defendant. The plaintiff then gave in evidence the letters of administration granted to him by the orphans court of *Prince-George's* county, on the estate of *Jane Fishwick*, dated the 6th of May 1812; and proved by the testimony of *Trueman Tyler*, register of the orphans court, that it did not appear from the records and papers in his office, that letters testamentary or of administration were ever before granted to any other person on that estate. The defendant then prayed the opinion of the court, and their instruction to the jury, that upon the evidence so offered and delivered, the jury may and ought to presume that *Robert Darnall*, in his lifetime, and the defendant claiming under him, and holding the slaves in question, held the same by a valid and sufficient title. And the Court, [*Johnson*, Ch. J. and *Key*, A. J.] were of opinion, and so directed the jury, that from the facts and circumstances stated, if the jury find them to be true, they might and ought to presume, that if the negro woman named *Dinah*, in the statement mentioned, ever was the property of the plaintiff's intestate, that she was legally transferred to the defendant, or to those under whom he claims, and that the plaintiff, on these facts and circumstances, cannot support this action. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at December term 1815, before CHASE, Ch. J. and NICHOLSON, EARLE and MARTIN, J.

Martin and *F. S. Key*, for the Appellant, referred to 2 *Saund*, 175. *(notes) Mundell's Lessee vs. Clerklee*, 3 *Harr. & Johns*. 462; and *Cockey's Lessee vs. Smith*, *Ibid* 20.

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Pinkney and *Magruder*, for the Appellee, cited *Eldridge vs. Knott*, 1 *Cowp.* 215; and *Carroll, et al. Lessee vs. Norwood*, 4 *Harr. & M'Hen.* 288.

Chase, Ch. J. delivered the opinion of the court. The court are of opinion, that the facts proved in this case on the part of the plaintiff, are sufficient to account for the delay which took place before the issuing the letters of administration to the plaintiff, and do repel the presumption that negro *Dinah* was legally transferred to the defendant, or those under whom he claims, and think the court below erred in directing the jury that they may and ought to make such presumption if they should find the facts and circumstances stated in the bill of exceptions to be true.

The opinion of the court is grounded on the fact that negro *Dinah* had been the property of *Jane Fishwick*, and there is no proof that *Jane Fishwick* was capable, at any time preceding her death, of making a legal transfer of *Dinah*; but the fair and necessary inference from the proof is, that she was a minor at that time. The claim set up by *Darnall*, or the defendant, to *Dinah*, seems to have originated subsequent to the death of *Jane Fishwick*, and was founded on the right to be reimbursed a claim he had against her, and for the money expended in burying the intestate, which in the most forcible manner resisted the presumption of a legal transfer. The small value of *Dinah* at the time of *Jane Fishwick's* death—the number of the representatives—their situation and distance from the place where *Jane Fishwick* died, and the bar set up by the defendant under the act of limitations, account satisfactorily for the delay on taking out letters of administration, and combined with her incapacity to make a legal transfer, and the nature of the claim of right set up by the defendant, resists conclusively the presumption arising from the great length of uninterrupted possession, the payment of the assessment, and supposed acquiescence.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

A new trial was afterwards had in the county court under the *procedendo*, at September term 1816.

1. The plaintiff offered in evidence the depositions of the witnesses, and the testimony by him offered in evidence at the former trial, and which are before stated. He also offered in evidence the following letter, proved to have been written by *Robert Darnall*, mentioned in the deposition of Doctor *William Beanes*, dated the 28th of June 1782, viz. "Yours of the 13th of May was this instant delivered to me by Mrs. *Hepburn*. The estate of Miss *Fishwick*, I have been ever ready (and am so still,) to deliver up to any person that will take out letters on it; he or they paying me my account against that estate. You will be pleased to observe, that exclusive of my claim, I am enti-

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tled to a child's part of the personal estate. If you doubt this, I would have you satisfy yourself in this particular before you come over, by taking the advice of counsel, as I have already done. God be praised, we can do very well without *Dinah;* her work has not been equal to the charge of maintaining four small children. I think, as you do, that the estate has been long unsettled, and that it is high time something was done in it. If it is delayed any longer than this fall, I myself must do something in it, for my own justification." The plaintiff further proved, that the several negroes mentioned in the declaration, except *Dinah*, were the descendants of *Dinah*, mentioned therein and in the depositions given in evidence, and were born after the death of *J. Fishwick*, and that they and *Dinah* were held by *R. Darnall* in his life-time, and until his death; and by the defendant since his death. He also gave in evidence the will of *R. Darnall*, dated the 20th December 1801, constituting the defendant his executor and residuary legatee; and proved that the said negroes were, at the time of *Darnall's* death, in his possession, and with the other property were taken into the possession of the defendant, who has ever since held them in his possession. He also offered in evidence the will of *Ann Loockerman*, dated the 2d of June 1755, bequeathing to her niece *Jane Fishwick*, the child her negro wench *Dido* went with, be it boy or girl, to her and her heirs forever. Also the will of *William Fishwick*, dated the 20th of January 1753, bequeathing to his daughter *Jinny Fishwick* £250, and devising his whole estate, both real and personal, to his wife for life, and after her death to his daughter *Jinny*, and the heirs of her body lawfully begotten, &c. and constituting his wife his executrix. He also offered in evidence an additional account returned to the prerogative court by *R. Darnall*, who had intermarried with the executrix of *W. Fishwick*, dated the 21st of May 1755, charging themselves with the balance of a former account passed by the executrix on the 22d of May 1754, amounting to 2952 lbs. of tobacco, and £3551 18 1 currency, also with sundry sums of money and tobacco since received, amounting, together with the above balance, to 8805 lbs. of tobacco, and £3964 13 4 currency, and claiming credits for payments, disbursements and commission, amounting to 1504 lbs. of tobacco, £352 6 11 sterling, and £57 7 6 currency. He also proved, that *Dinah*, in the declaration named, was the slave *Dinah* mentioned in the deposition of *E. Clagett*, and in the letter of *Darnall*, as the property of *J. Fishwick*. The defendant then gave in evidence, by the testimony of *T. Tyler*, that the witness heard a conversation at various times between *S Hepburn*, (father of the plaintiff, who departed this life before the granting of the letters of administration to the plaintiff,) and the wife of said *Hepburn*, on the subject of the claim of the representatives of *J. Fishwick* to *Dinah*, and that the said *Hepburn* declined administering on her estate, and gave as reasons for declining, the

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number of the parties interested in her estate, the small value of the property, the expense of getting out letters of administration and bringing suit for the property; that he had no money to spare for such expenses; the claims of Mr. *Darnall* on the estate, and the statute of limitations, which would bar the claim of her representatives to her property. He then gave in evidence sundry letters from *J. Muir*, the husband of *S. Muir*, who was one of the half sisters of *J. Fishwick*, and the person to whom the aforementioned letter of *Darnall* was addressed, viz. one dated the 7th of January 1775, "I am informed by your letter that Doctor *Digges* has proved his account against *Jane Fishwick*, deceased, and impatient for his money, which he or you shall have as soon as opportunity serves to send it to Doctor *Murray* in *Annapolis*, provided you have not already administered, which I am told there is not any occasion for, as the parties are all of age excepting *P. Nevitt*, and Doctor *Murray* represents her as guardian. Please write me on your receiving of this whether you have administered or not, and by that time I expect to receive a letter from Doctor *Murray*, to whom I have written on the subject." Another dated the 13th of May 1782. "The little estate of Miss *Jane Fishwick*, that is her negroes, &c. has a long time lain unsettled, although Doctor *Murray* has often been applying to me requesting that I would administer on it. The great distance, and perhaps not being able to get security as a stranger, and knowing that Mrs. *Darnall* could not do without *Dinah*, has been the occasion of the long delay. To remedy which have spoken to Mr. *Hepburn* to have something done in it, which if he declines, must endeavour to come over; previous to which should be glad you would inform me by letter, what you propose doing." Another dated the 5th of May 1786. "You say as for the small estate of Miss *Fishwick* you have paid it long since agreeably to my letter. Should be glad to know by first opportunity to whom it has been paid; if it has, there has never been any thing yet received by your humble servant." The defendant then also gave in evidence, the following account, claimed by *Darnall* in his life-time, against the estate of *J. Fishwick*, and copied from *Darnall's* books, viz.

"Dr. The estate of *Jane Fishwick*,	Contra.		Cr.
To paid Doct. *Digges*, account proved,	29	9	6
To cash paid Doctors *Scott* & *Murray* for a visit,	6	0	0
To funeral expenses,		10	0
To one fourth part of said wench and child,	20	0	0
To your board and education, &c. for 20 years.			
To interest till paid.			
Cr.			
1775. By one mulatto wench called *Dinah*, with a child at her breast, value,	80	0	0

E. E. p. *R. Darnall.*"

He also read in evidence the deposition of *Patrick Sim*, who deposed that *J. Fishwick* was the daughter of Mrs. *Darnall*, wife of *R. Darnall*. That he thinks Miss *Fishwick*

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died in 1774. He sailed for *England* in September of that year, and he thought she died a little before. He understood she was dependent upon her step-father and her mother for her support. He also offered in evidence the account of Doctor *Digges*, and the payment thereof by *Darnall* on the 12th of September 1775; and proved by *T. Tyler*, that all the negroes in the possession of the defendant had been for many years past, ever since the death of *Darnall*, assessed to him by the commissioners of the tax for *Prince-George's* county, and the assessments paid by him; but the assessment lists did not specify or contain the names of the slaves assessed. The defendant then prayed the court to give the following instruction and opinion to the jury: If the jury should be of opinion from the testimony offered to them, that shortly after the death of the plaintiff's intestate, *Darnall* took possession of negro *Dinah*, and such of her children as were then born, claiming a right to hold them on account of claims which he had against the estate, and debts due from the estate, and paid by him after her death, and refusing to deliver them up, except upon payment of said claims; and that the said claims, and *Darnall's* refusal to deliver up the property, were made known to the representatives of the plaintiff's intestate as early as the year 1782, and that after that time *Darnall* claimed, held and used the said negroes as his own, denying all title of the representatives of the deceased to the said negroes, or any of them; and that he continued to use and exercise every act of ownership over the negroes until the time of his death, which happened in the year 1803; and that after his death the defendant, who was his residuary legatee, took possession of *Dinah* and the whole of her issue, held and used them as his property, denying all title of any person claiming under *J. Fishwick*, and that he had the peaceable and undisturbed possession of the said negroes in manner aforesaid, from the year 1803 until the demand proved to have been made by the plaintiff, that then the plaintiff cannot recover any damages under the second issue joined for the conversion of *Dinah* and her issue. But the Court, [*Key* and *Plater*, A J.] refused to give this instruction to the jury. The defendant excepted.

2. The plaintiff then offered in evidence the account hereinbefore mentioned to have been returned to the prerogative court by *R. Darnall*, who had married the executrix on the estate of *W. Fishwick*, certified under seal by the register of wills of *Dorchester* county. To the admission of which account in evidence the defendant objected. But the Court, [*Johnson*, Ch. J. and *Key* and *Plater*, A. J.] overruled the objection, and admitted the account to be given in evidence. The defendant excepted.

3. The defendant then prayed the opinion of the court and their direction to the jury, that if they found the evidence

to be true, as well on the part of the plaintiff as of the defendant, that then they might presume from such evidence, that *Darnall*, with the assent of the persons entitled to distribution of the estate of *J. Fishwick*, took upon himself the executorship, and fully administered all the assets of the said *J. Fishwick* by paying debts and funeral charges to the value of such assets, and that the plaintiff was not therefore entitled to recover. Which opinion the Court, [*Key* and *Plater*, A. J.] refused to give. The defendant excepted.

4. The defendant then prayed the opinion of the court to the jury, that if the jury found the evidence to be true, that then the plaintiff was not entitled to recover against the defendant the value of *Dinah* and all her descendants named in the declaration. This opinion the Court, [*Key* and *Plater*, A. J.] refused to give. The defendant excepted.

5. The plaintiff offered in evidence under the second issue joined, the letters of administration granted to him as hereinbefore set forth; and offered to prove by *T. Tyler*, register of wills for *Prince-George's* county, that it did not appear from the records and papers in the office of the orphans court of the said county, that letters testamentary or of administration were ever granted to any other than the plaintiff on the estate of *J. Fishwick*. The witness further proved that he had not found in the course of his researches that any summons was ever issued to any of the representatives of *J. Fishwick* to appear and take out letters on the said estate, or that any notice was given to them of any application by the plaintiff, or any other person, for letters of administration on the said estate. That the witness had been in the office of register of wills for the said county as a deputy, or as register, for the last twenty years, and was confident that no summons had within that time been issued for the representatives or any creditor of *J. Fishwick* to appear and take out letters of administration, or any notice given them of any application for such letters by the plaintiff. That letters of administration were granted to the plaintiff by one of the deputies in the office, during the recess of the court, and in the absence of the witness. The defendant then swore *J. Burch*, the deputy who had granted the said letters, who stated that the said letters were granted by him in the recess, and without the authority of the orphans court made known to him by the court in that particular case, but according to the usual practice of the office, which practice was known to and approved by the court. And the records of the court were produced, whereby it appeared that the said court was not in session on the day of issuing of the said letters of administration to the plaintiff, and it did not appear that any application for said letters was made to the said court; but the plaintiff had applied to the register, during the recess of the court, some weeks before the granting the same, for

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letters of administration on the said estate. The defendant objected to the admissibility of this evidence under the second issue joined. But the Court [*Johnson*, Ch. J. and *Key* and *Plater*, A. J.] were of opinion that the said evidence, and the said letters of administration, were admissible, and allowed the same to be given in evidence under the second issue joined. The defendant excepted.

6. The defendant then offered in evidence the account or claim of Doctor *Digges* against *J. Fishwick* before mentioned, and proved that the amount thereof was paid by *Darnall* on the 12th of September 1775. He also offered other evidence to prove to the jury the payment by *Darnall* of other claims against the estate of *J. Fishwick*; and then prayed the court to instruct the jury, that it was competent to them to recoupe in damages, the amount of such payments made by *Darnall* to the creditors of *J. Fishwick*, so far as the jury were satisfied that such payments had been made by *Darnall*. But the Court, [*Johnson*, Ch. J. and *Key* and *Plater*, A. J.] refused to give this instruction, and were of opinion that no such discounts could be admitted, or any deduction from the damages for the conversion of the property claimed in the declaration could be made by the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued at the present term before CHASE, Ch. J. and BUCHANAN, EARLE, MARTIN, and DORSEY, J.

Magruder, for *Sewell* the Appellant. On the *first* bill of exceptions. The evidence stated shows a total abandonment of the property, and no steps taken to recover the negroes on the part of the plaintiff, or those interested therein, for upwards of 30 years. The question is, whether the possession of the property will not avail the defendant under his second plea? The ground of the action is conversion of the property, and the plea of limitation commenced when the conversion took place. *Darnall* was guilty of a conversion in the act of taking possession of the property. If he was guilty then, he was the moment he set up a title to it in 1786. But if his possession was lawfully acquired, his subsequent claim of the property was the conversion of which the plaintiff complains. He cited 6 *Bac. Ab.* tit. *Trover*, (B,) 679. *Bristol vs. Burt*, 7 *Johns. Rep.* 254. There can be no doubt but that *Darnall* was guilty of a conversion in his life-time. The defendant took possession in 1803, and has always since claimed the negroes as his own property. And as more than three years have elapsed from that time, the plaintiff cannot recover. The replication to the defendant's plea of limitation, is general, saying that three years had not elapsed when the suit was brought. The plea has been supported by the defendant, and it is a complete bar to the

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plaintiff's action. But it will be said that there was no administration on the estate, and that until there was a demand made by the administrator there could be no limitation. Where the party is rightfully in possession of property, then a demand and refusal are necessary to constitute a conversion; but if the possession is unlawful, no demand is necessary; and a demand and refusal, in such a case, would not avail the plaintiff. From the time of taking illegal possession, limitations commenced, because the conversion arose on the unlawful possession. But it may be said that this case is an exception from the general law on this subject, because here there was no administration. There are, it is true, exceptions to the plea of limitations, as in the cases of infancy, non-residents, &c. if the party takes advantage of the exception, but not otherwise. This case by the replication is not put upon the ground as to the time when the letters of administration were granted, so as to take the case out of the statute. The plaintiff should have replied specially what he intended to rely on. In the cases of infancy, &c. the replications are special where the exceptions in the statute are relied upon. Here there has been an abandonment of the property for more than 30 years; and after every person, who could have any knowledge of the facts, have ceased to exist, this claim has been brought forward, and has been made by a volunteer. If there is any case to which limitations should apply, it ought to apply to this. There was always a person answerable to the creditors of the deceased. For taking it upon the ground that there was no rightful administration, *Darnall*, by taking possession of the property, made himself executor *de son tort*. He could have been compelled to settle up the estate. He was an executor for every purpose except that of bringing actions. 4 *Bac. Ab.* tit. *Limitation of Actions*, (E 5,) 479. *Curry vs. Stephenson*, 2 *Salk.* 421. S. C. *Carth.* 335; and *Webster vs Webster*, 10 *Ves.* 93.

On the *second* bill of exceptions. It is not stated for what purpose the account contained in this exception was given in evidence. It could have been but for the illegal purpose of inflaming the damages to be recovered.

On the *third* bill of exceptions. There was strong presumption that *Darnall* acquired a good title to the negroes. His uniform and undisturbed possession, and that of the defendant for near 40 years, and no satisfactory account given why the claim now set up was not before made, are conclusive circumstances to show a good title. The defendant was not bound to show how he came by the property. If his long possession, and the possession of *Darnall* under whom he claims, are not sufficient to protect him in his possession, there is no security for property; and if he is not entitled to the presumption of having a good title, no person can be secure in his property, no matter how long he may have had possession of it. Length of possession strengthens a man's title to property; and here has

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been a sufficient foundation laid whereon to presume a title. Acts of parliament, grants, deeds, &c. are always presumed for the purpose of quieting possession; and if so, why not in this case presume that a valid transfer of the property had been made to *Darnall*. Evidence of the title to property of this description need not be put upon record, and there is consequently a stronger ground to let in presumption here than where a party is bound to place his title on record. 1 *Fonbl.* 319, (and *note*)

On the *fourth* bill of exceptions. As the descendants of *Dinah* were born after *Darnall* had taken possession, and some of them a short time before the suit was brought, and *Darnall*, and the defendant, had been at considerable expense in raising them, the value of the negroes to be recovered should be their value at *the time of the conversion*. The party cannot postpone his suit until the property becomes valuable, and recover the value at any time after the conversion. An action of trover is for damages for the tort by the conversion committed of the thing. Suppose *Dinah* had died in the possession of *Darnall*, suit might be brought for her value when she died. Taking the conversion in 1786, then the damages are to be for the value of the negroes at that time. *United Insurance Company vs. Robinson*, 2 *Caine's Rep.* 280.

On the *fifth* bill of exceptions. The letters of administration granted to the plaintiff in 1812, were offered in evidence under the issue joined on the plea of limitations, although they were not relied on in the replication to that plea. There was no summons for, or notice given to, the representatives of *J. Fishwick*, to appear and take out letters; but they were obtained by the plaintiff without notice or summons, from one of the clerks in the office in vacation. There was no evidence offered that the orphans court approved of the letters being so granted, except a general order authorising the register to grant letters in all cases when applied for. To defeat the plea of limitations these letters were produced, to show a recent demand after they had been granted, and that limitations did not begin to run until 1812. This was not necessary, unless it be the law that a demand and refusal constitute a conversion. But the letters were granted to the plaintiff without any authority. He did not stand in the character of a creditor, or as a representative of the deceased, so as to entitle him to demand the letters. He obtains them without the sanction of the court or even of the register.

On the *sixth* bill of exceptions. The jury might recoupe in damages; that is deduct the amount of what *Darnall* and the defendant had paid on account of Miss *Fishwick*, and for their claim against her estate. *Bull. N P.* 48. *Toller*, 365. 3 *Bac. Ab.* tit. *Executors, &c.* 25. *Witehall vs. Squire*, *Carth.* 104.

Jones, (District Attorney of *Columbia*,) on the same side. As to the act of limitations, relied on in the *first* bill of ex-

ceptions, which he stated was an original question, he said he intended to rely, in addition to the authorities cited, upon *Went. Off. Ex'r.* 49, in the original, and 125 in the supplement, where the doctrine of relation is treated of. As to the presumption relied on in the *third* bill of exceptions, he cited 1 *Phill. Evid.* 119, and the authorities referred to. On the *fourth* bill of exceptions, *Leach vs. Slater*, 1 *Harr. & M'Hen.* 513. On the *fifth* bill of exceptions he should contend that the letters of administration were *ipso facto* void. He cited *Griffith vs. Frazier*, 8 *Cranch*, 9. On the *sixth* bill of exceptions, he cited 2 *Blk. Com. (Tucker's* edit.) 507, 508, (*ch.* 32.) *Anon.* 12 *Mod.* 441; and *Parker vs. Kett*, *Ib.* 471, 1 *Vent.* 349.

F. S. Key, for *Hepburn* the Appellee. On the *first* bill of exceptions. Conversion is the gist of the action of trover; and one of the questions in this case is, when did the conversion here happen? The plaintiff proved a demand and refusal in 1812. But it is said that some act of *Darnall*, many years before administration was granted to the plaintiff, amounted to a conversion. The acts of *Darnall* did not amount to a conversion. They would not have amounted to a conversion, if there had been at the time an administration on the estate. There is no evidence of the change of the intention of *Darnall* as to the manner in which he held the property. He declared at one time, in 1782, how he held it, and he never stated himself at any time to hold it absolutely as his own. He held it to satisfy his claim, and professed himself ready to deliver it up to the rightful administrator, and until, therefore, there was a demand by such administrator, there could be no conversion. Conversion is a tort, and to commit a tort there must be some person upon whom to commit it. Here there was no person to be affected by the tort, there being no administration. Until there was an administrator there was no person to sue for the property. The plea of the act of limitation cannot bar where there is no person against whom limitations can commence. It could not run against the representatives, because they could not sue. 4 *Bac. Ab.* tit. *Limitation of Actions*, (E 5,) 479. 2 *Esp. Dig.* 210, *(595,)* cites *Wortley vs. Sandwick*, *Farresley*, 99. In *Webster vs. Webster*, 10 *Ves.* 93, the disability lay on the part of the defendant, and the plaintiff there had a right to sue; and because the defendant might have been sued as executor *de son tort*, the Lord Chancellor decided that limitations was a bar. That case, therefore, does not support the position for which it was cited on the other side.

On the *second* bill of exceptions. As *Darnall* had set up certain claims against the estate of Miss *Fishwick*, the account offered in evidence in this exception was offered to show that he was a debtor to the estate of her father, to which estate she was entitled, and therefore that those claims ought not to be deducted; and not for the purpose

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for which it is said to have been offered of inflaming the damages.

On the *third* bill of exceptions This is the only exception upon which there can be the least doubt The prayer is somewhat vaguely expressed If it is that *Darnall* took upon himself the executorship, he should have gone on and completed the administration. He could not sell the property to himself; and even if he did administer, he can make out no claim as administrator. He could not retain the property and charge the value to himself. It cannot be presumed, therefore, that he fully administered the estate. There is nothing to entitle the defendant to the presumption that there was a transfer of the property to *Darnall* by the representatives of the deceased, or any settlement of the estate by him, with their assent. There are no circumstances proved to justify such a presumption, but length of time and uninterrupted possession. These it is admitted are *prima facie* evidence, unless repelled by proof. This proof has been given by the plaintiff, and he therefore comes within the opinion delivered by this court on the former appeal. There were two ways of rebutting the presumption, one was to account for the delay in not prosecuting the claim, and the other to prove facts inconsistent with the presumption. Both of these have been done by the plaintiff. The delay was unavoidable, and proceeded from good causes, and is sufficiently explained in evidence. There were *femes covert*, minors, and the parties residing at a distance, &c. among the persons entitled to the estate. These are sufficient excuses. *Eldridge vs. Knott*, 1 *Cowp.* 214. No improper design can be imputed to the representatives for the delay which took place. There can be no pretence for the presumption. The facts are inconsistent with it. No such agreement or assent can be inferred. If there had been an agreement, it would have been in writing, and would have been preserved in the manner the old letters and account produced were preserved. *Muir's* letters in 1782 and 1786, show that there was no such agreement. Mr. *Hepburn's* conversations, just before his death—the evidence of Doctor *Beanes*, showing *Darnall* had informed the defendant of his claim against the estate, and how he was to defend himself, are strong circumstances and proof that there never had been such an agreement. The account exhibited from *Darnall's* books makes no mention of an administration, or any thing about the agreement. The whole evidence goes to prove, that the defendant never thought of any such agreement, but relied solely on limitations. Admitting the evidence would justify the presumption, how does the case stand as to the fair administration of the estate? The father of Miss *Fishwick* bequeathed her a legacy of £200, to be paid on her arrival to the age of 21 years. This sum was never paid by *Darnall*, who married her mother, the executrix of her father. He had then funds in his hands to pay doctor's bills, &c. without holding *Dinah* and her children.

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On the *fourth* bill of exceptions. The general principle is that the measure of damages is the value of the property at the time of the demand. But it is said that there were expenses in supporting the negroes. There was no evidence given of any such expenses. The services of the negroes greatly exceeded the expenses of their support. The whole subject was before the jury, and they had a right to deduct what they thought proper.

On the *fifth* bill of exceptions. The letters of administration offered in evidence were under the seal of the court, and cannot be questioned. No parol evidence can be gone into to show how they were obtained. At all events they could not be questioned, unless by way of a plea. The declaration expressly states the granting the letters, and the demand and refusal. The acts of the deputy register are to be considered as the acts of the register, and he had authority from the court to grant the letters.

On the *sixth* bill of exceptions. The claim on account of debts paid, could not be set off in this action of tort. This is not like an action against an executor *de son tort*: there is no sort of connexion between the two cases. If the defendant was sued as executor *de son tort*, he might then claim to be allowed for any money he had paid; but he could not claim for money paid by *Darnall*. An executor *de son tort* for lawful acts, may claim a discount; but for unlawful acts there can be no allowance. He shall not retain the property, and claim to recoupe. *Bull. N. P.* 48. *Toller*, 365. 2 *Esp. Dig.* 211. Therefore, taking this as a suit against *Darnall*, as executor *de son tort*, he could not recoupe.

Martin, (Attorney-General,) on the same side. On the *first* bill of exceptions. For a conversion committed of the property by the defendant, he attempts to excuse himself by certain acts of *Darnall*: and because *Darnall* had been guilty of a conversion 30 years before the conversion by the defendant, the defendant claims to be excused his own conversion. Suppose this could avail the defendant if he had pleaded it, yet as he has not pleaded it he cannot set it up as a defence. No person can set up an antecedent conversion to excuse or get rid of a subsequent one. In truth there can be but one real conversion—such a one as terminates the existence of the property, as if a man kills and eats an ox, this is a complete and real conversion. There are other conversions, if the property is not destroyed, to be conversions only at such time as the plaintiff may elect to make them so. So long as the property remains in existence, when the owner chooses to demand it, and there is a refusal, then is there a conversion. No right is changed by the conversion; nor does length of possession change or alter the right. It may bar the action, but the right still remains. The mere claiming of goods is no conversion. The party must dispose of them before he can take advantage of the time when the conversion commenced. 6 *Bac. Ab.* tit.

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Trover, (B) 679, 680. For a tortious taking without conversion, trover will not lie. If the party intends to bring an action of trover, he must make a demand. There must be an actual conversion after a tortious taking. A verdict in trover and satisfaction amounts to a transfer of the property. The property is considered in law to be in the person injured, for the purpose of punishing the wrong-doer for the trespass, &c. Conversion is the gist of action, and for which damages are recovered. There may be a subsequent conversion, for which the party may recover—as "if a person takes my horse to ride and leaves him at an inn, that is a conversion;" but suppose no action is brought, yet the property in the horse remains, and any subsequent injury may be elected to be sued for. But if the plaintiff elects for what injury he claims damages, his action must be brought within three years after such injury. If the property remains in existence, trover will lie for any injury the party may elect to sue for; but if the existence of the property is terminated, then the conversion is at an end, and the action must be within three years thereafter. Here, no matter how many injuries were done to the negroes in question by *Darnall*, yet the property remained in *J. Fishwick*, or her rightful administrator, and he may bring an action for the injury done by the defendant. Unless there is an action for a total conversion, the property in specie remains in the original owner, and an action may be brought for any after injury. There may be acts done which the party claiming may elect to consider as a conversion. As "if J. S, who lawfully distrained a beast, work it, this is a conversion," and trover will lie; but the working the beast does not destroy the property in it. If he, three years afterwards, sell or kill the beast, the former conversion will not prevent an action being brought then. While the property remains in possession of the person who does the injury, he is liable for any particular injury which the owner may elect to sue for. It is not necessary that the property should continue to remain in the possession of the person injuring it, between the times of committing the two or more injuries. It is not the tortious taking for which the action lies—but the conversion. If a person finds a garment, and wears it, this is a conversion. His duty was to keep it, and not use it, until after a fair presumption, that there was no owner for it. But if there is no demand until three years after the wearing it, yet an action may be brought after a demand and refusal. There can be no conversion unless it be one in reality by a total destruction of the property, wherein the party is not bound to elect. The cause of action accrues on the conversion; and when the party is called upon to restore the property, and refuses, the law presumes that he applied the property to his own use, and it is *prima facie* sufficient evidence of a conversion. *Ball. on Lim.* 96. That there may be subsequent conversions, is established in *Swayn vs Stevens*, *Cro. Car.* 245. *Ball. on Lim.* 97. The action does not

depend upon the length of time the property is out of the possession of the party injured; for though he is out of possession, it is still his property. If the property remains in the hands of the person who committed the first conversion, he may be proceeded against for the second conversion. If the property gets into the possession of another person, after an injury had been committed on it, a recovery may be had against the person who committed the last injury. There is no principle of justice or equity which can militate against this construction. The word *conversion* has led to the mistake into which the appellant's counsel have fallen. When it is rightly considered what is a conversion, there can be no doubt upon the subject, because there may be 100 injuries of the kind which the law considers as amounting to a conversion. 2 *Esp. Dig.* 595. *Wortley vs Sandwich*, 7 *Mod.* 99. Here it is contended that there was no act, antecedent to the demand and refusal in this action, which amounted to a conversion, and for which an action could be brought, had there been any person who could have brought the action. Before the letters of administration were granted to the plaintiff, there was no person who could claim, and the statute of limitations begins to operate only from the time a right to demand the property vests in some one. 4 *Bac. Ab.* tit. *Limitation of Actions*, (E 5,) 479, (*note* a.) *Curry vs. Stephenson*, *Carth.* 385. *Joliffe vs. Pitt*, 2 *Vern.* 695. Here the first conversion was on the demand by the plaintiff, and refusal by the defendant, for until then there was no person who could demand and claim for a conversion. Whether *Darnall* was liable to be sued as executor *de son tort* or not, has nothing to do with this case. He could only have been sued by the creditors, and the plaintiff does not claim as a creditor. *Darnall* was as much bound to take out letters of administration as any other person. He claimed as one of the representatives. All the rest of the representatives had sufficient excuses for not administering; but *Darnall* had none. The plaintiff now claims the property, that he may administer it, and do that which ought have been done by *Darnall*. Nothing had taken place to prevent this, as the property is in existence, and unchanged in any manner. The counsel for the appellant has cited *Went. Off. Ex'r.* 49, (125,) for the purpose of showing that the letters granted to the plaintiff must relate to the time of the death of the intestate, so as to let in the plea of limitation in order to defeat the action. Relation is a fiction of law, introduced for the sake of doing justice; but if introduced in the manner contended for in this case, it would work injustice Relation of the letters of administration to the time of the death of the intestate, is allowed for the purpose of preventing limitations from barring; and it is allowed for the purpose of punishing all intermediate trespasses committed on the property of the deceased, and to enable the administrator to take possession of the property for the purposes of administration.

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Letters testamentary have relation to the death of the testator, so as to render void all intermediate acts by the administrator.

On the *third* bill of exceptions. It is supposed that the prayer in this exception was, that although no letters testamentary appeared upon record to have been granted to *Darnall*, yet it might be presumed that they had been granted to him, and that he had fully administered the estate. As there was no will made by Miss *Fishwick*, there could be no letters testamentary granted on her estate, and there is no evidence to justify the presumption that any letters had been granted. There was none in 1782, and there is nothing showing that any had been granted since. But more is here asked to be presumed than could be asked if there was an administration appearing upon record. How can it be presumed that *Darnall* fully administered, when it is in evidence he had property of the deceased in his possession. He could not by paying the debts, keep the property. In 1786 *Muir* denies having ever received any thing; and there was no proof of payment to any of the other representatives. The evidence not only rebuts the presumption that *Darnall*, with the assent of the representatives, administered on the estate, but it proves satisfactorily that there was no such administration.

On the *fifth* bill of exceptions. The letters of administration granted to the plaintiff is conclusive evidence that they were granted in due form of law by the orphans court, and no parol evidence was admissible to show that they had been improperly granted. There was nothing in the manner of granting them by which they could be revoked by the orphans court; and until they are revoked, they are evidence that the plaintiff is the administrator. The decision in *Griffith vs. Frazier*, 8 *Cranch*, 9, was on the ground that there was no power in the persons to grant the letters, as former letters had been granted, and not whether they were improperly granted; and the court decided that when letters were once granted, by a court having competent jurisdiction, and were unrevoked, no new letters could be granted. A distinction is there taken between an erroneous act of a tribunal having competent jurisdiction, and the act of a tribunal having no authority. The case cited sanctions rather than operates against the case before this court.

On the *sixth* bill of exceptions. The object of the prayer in this exception was, that any debts which *Darnall* had paid for Miss *Fishwick* might be deducted from the damages to be assessed in this action. *Darnall* might have claimed such a deduction if the action had been brought against him, and he had paid the debts with his own money, and there was no other property of the intestate, except that in his hands. He may have sold property of the deceased to the amount paid by him. There is strong presumption that the debts were not paid with his

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own money. It has been shown that a legacy of £200 sterling was left to her by her father, besides a large balance due his estate from *Darnall* who married the executrix, to which she was entitled. And from *Muir's* letter in 1775 the presumption is, that he paid the debts, for he said he should pay the money due Doctor *Murray*. Where an allowance is to be made to an executor *de son tort*, it is, where the property of the deceased is sold by him, and he accounts for the amount by showing it had been paid away for debts due from the deceased. And this too is only done when he is called on by the creditors of the deceased, and not where he is called on by a rightful administrator. *Toller*, 365. Where the executor *de son tort* retains the property, no such allowance is made. *Bull. N. P.* 47, 48. 1 *Went. Off. Ex'r.* 181, 182. 1 *Ventris*, 349. The cases of, *Anon.* 12 *Mod.* 441, and *Parker vs. Kett*, *Ib.* 471, do not impugn this principle. But here is no action against an executor *de son tort*—this is an action against a person who never acknowledged he held the property of the intestate, nor had paid debts which he wished to be recouped from the damages. But even if such a deduction could have been made in an action against *Darnall*, the defendant upon no principle of law can claim to recoupe from the damages a debt paid by *Darnall*, when he is sued only in his own right, and not as the executor or administrator of *Darnall*.

Jones, (District Attorney of *Columbia,)* in reply. The bill of exceptions, which stands the *fifth* in order in the record, will be first considered; that is, the one which relates to the title of the appellee to appear in this court. If the appellee has right, it has been by the oversight of the persons interested; and if that right should be thought a valid one, it gives to him a title which he had not before. It appears that these letters of administration were obtained by the appellee without any previous notice having been given to the persons interested, and without any citation having issued. In *limine* then, their obtention was a clear and manifest transgression of the testamentary system, from which the powers and authority of the orphans court are derived. Such an open and obvious violation of their powers, that this court are at liberty, nay, they are bound to say, that the orphans court, in the granting of these letters, had no jurisdiction, and therefore that the letters themselves are, to all intents and purposes, void. The jurisdiction of the orphans court is a strictly limited one. The powers of the register are purely ministerial. All the the powers of the orphans court depend on statutory provisions. It is the statute which points out who shall be entitled to administration on intestate's estates. That it shall be first given to the next of kin in a prescribed order, and on their refusal then to the creditors. If neither next of kin nor creditors apply, letters *ad colligendum* are issued to preserve the estate. It is not necessary to travel through

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all the powers of the orphans court. It is sufficient for our purpose that they have only jurisdiction in the particular cases given by the statute. The orphans court differs *toto cælo* from the tribunal we now address. Their powers are tied down by the statute. If they grant administration to any one whom the statute does not entitle to it, they exceed their jurisdiction—they transgress their powers—they act without authority. It is admitted that the judgment of a court of competent jurisdiction is, as to all matters decided by them, final and conclusive; that it can never afterwards be questioned by any other tribunal. But there is a vast and material difference between bringing under review the judgment of a court, in cases where they have jurisdiction, and that of calling in question the acts of a tribunal which have been done through fraud or by a clear transgression of its jurisdiction. It can scarcely be necessary to refer the court, for this purpose, to the case of *The Duchess of Kingston* before the House of Peers, as it must be familiar to them. In the decision of that case, the correctness of a decision of an Ecclesiastical court was involved, and it was determined, that as such decision had been obtained *per fraudem*, it was *ipso facto* void, and the decree of that court was therefore nullified. Here we have an additional reason for vacating the letters of administration granted to the appellee; for besides their having been obtained *per fraudem*, they were illegally obtained; that is, they were acquired *coram non judice*. The court have been referred to the case of *Griffith vs. Frazier*, 8 *Cranch*, 9, not for the purpose of shewing that in all cases the judgments of other tribunals can be brought in issue, but only to shew that where *such judgments are absolutely void*, it is not necessary to go into that court for the purpose of vacating them, but that that object may be effected in a court of appellate jurisdiction. That case came before the supreme court upon a writ of error to the circuit court for the district of *South Carolina*. The court of probate of *South Carolina*, a court in many respects similar to the orphans courts of this state, have the power of granting letters *durante absentia*. A power, however, denied them under peculiar circumstances. To come at the fact whether these peculiar circumstances existed, the appellate court thought itself authorised to make the inquiry, so far as it could be made in the record. And when from the record it appeared that such circumstances did not exist, and of course that the court of probate had granted the letters *durante absentia*, without having had jurisdiction to do so, the appellate court decided that such letters were *ipso facto* void, and gave judgment accordingly, though the legality of the letters was only collaterally brought in issue. To apply that case to the present—It is true that the letters of administration here are *prima facie* evidence that the appellee was entitled to them; but when we examine the record it is obvious that he was not entitled, and that the facts in the case are such as did not give the orphans court

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the power of granting them; because the record shews that there *were others who were entitled*, and that the *requisites* of the *testamentary system*, under which, and under which *alone*, the orphans court can act, *have not been complied with*. This court are here called on to receive and foster a monster in legal proceeding; for they are not only required to sanction the acts of a court, but of the register of a court--nay, not the acts of the register, but of the register's deputy. The question here indeed seems to be not so properly whether the orphans court had jurisdiction to issue the letters, because there is no evidence that the court did grant them, but on the contrary it is evident that the court did not grant them, as they were not in session when they were granted, but whether the orphans court have the authority to transfer their powers and duties to their register. Are we to be prevented from calling these letters in question because they have the seal of office attached to them? Has a seal such magic in it that it wraps every thing it touches in mystery? The orphans could act either judicially or ministerially. If they act ministerially it is evident that their proceedings may be inquired into, and that they are not conclusive. If they act judicially it is also evident that though we may not be authorised to inquire, (which is not admitted,) into the lawfulness of their conduct, yet it by no means follows that we may not examine into the fact whether they have acted at all or not—whether the act of their register is to be considered as their own. Let the rolls of this court be applied to for an illustration, and we ask, if any person *by accident* or *fraud* should, during the recess of the court, obtain the seal to a professed judgment of this court, when no such judgment had ever been rendered, the party affected thereby would be bound by it until the judgment had been vacated by writ of error? Or, whether when the court, by whom it professed to have been rendered, denied it, and the party was able to prove undeniably that such court was not in session at the time when the judgment appeared to have been passed, it could not be avoided when collaterally brought in issue? And that where a person claimed lands purchased under an execution on such judgment, in the trial of an action of ejectment for such lands, the opposite party would not be able, by proving the judgment to have been obtained by mistake or fraud, to nullify it. It would indeed be a monstrous absurdity, that a writ of error should lie on a judgment which never had been rendered. The most reasonable way, surely, is to treat such acts as *ipso facto* void. But an objection to these letters being declared void, because they were not granted by the court, but by the register, is that the court have adopted the practise of so delegating their authority. If any such practice existed, it is founded in absurdity. But on inquiry none such is found. However, if its existence was true, this court have to decide on it as if it had been adopted at the issuing of these letters for the first time, because it is now for the first time

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brought under their cognizance. Precedents have no force except in the tribunal by whom they have been established. As the legality of this practice of the orphans court was never previously inquired into by this court, it is, so far as regards precedent, of no more weight, than if it had in point of fact commenced yesterday. Where a man dies intestate are his infant children to be put under a guardianship unknown to the law? It is the judges of the orphans court, and they alone, to whom the law is willing to confide this important and delicate trust—men chosen for their high standing in private life, and their knowledge of the laws of the land. Is it to be permitted that the register, or the register's deputy, may say to them, the forms of proceeding are yours, but I will be your Viceroy? No such anomaly can exist—none such can be sanctioned by this court. The case of *Griffith vs. Frazier* is conclusive on this point. There the general jurisdiction of the court of probate was acknowledged, but its exercise in that particular case was declared to be beyond their jurisdiction, and therefore *ipso facto* void. Here the letters of administration would be void if they had been the act of the orphans court, because by the act of assembly under which only the court have power, the appellee was not entitled to them. But if he had been entitled, they would be void, not having been granted by the court, but by the register's deputy. The act of congress points out a method, by which only the proceedings in state courts can be certified, so as to be evidence in another state; that is, that the chief judge of the court, in which the proceedings take place, shall certify them. The effect, therefore, of giving validity to these letters would be, that it would make them binding in the state, but not out of it; since the chief judge of the orphans court, in which they appear to have been granted, could not give them efficacy in any other state by certifying them as the act of congress directs, the court not being in session when they were granted.

A point which arises under the *first* bill of exceptions will now be examined—Whether, admitting the letters of administration to have been legally obtained, the appellee is entitled to recover? Here a question of first importance presents itself, which is, whether by statute or common law there is any such thing as acquiring a right to property by length of possession, because if forty years possession will not give a title, no lapse of time can vest one. It will be shown in the first place, that the appellant's possession of the property now in dispute is protected by the act of limitations; and secondly, if limitations do not apply, that the doctrine of presumption affords him an ample defence—a doctrine which has been established for the purpose of supplying the foresight of the legislature. As to the importance of these questions none can doubt. The dispute here is as to the right of property to a negro woman, and her issue, who have been in the appellant's possession—undisturbed possession for forty years. If a possession for

this length of time will not give a title, on the same principle one acquired in the days of Lord *Baltimore* will not give one. If any person should choose to trace back the title to personal property so far, and finds it to have belonged to an individual of that day, and after searching through the musty records of your orphans courts, discovers either that no administration was ever taken out on his estate, or what (according to the reasoning now relied on,) amounts to the same thing, that there remains no evidence of such an administration, he has only to take out letters himself, and he instantly becomes entitled to all the said property, together with its increase from that day to this, limitations and presumptions to the contrary notwithstanding. If, in a word, the claim of the appellee in this case can be supported, no length of possession can secure a title—nothing can prevent claims like the present from springing up but the hand of time, which buries both property and owner in one common ruin. If the property has been originally wrongfully possessed, and the letters of administration are construed for this purpose as relating back, the first taker not only is made liable, but his representatives *in infinitum*; because if the wrongdoer has no right, and limitations and presumption are displaced, he can give no right to his representatives. But the true and correct principle is, that an administrator is the owner by relation for every purpose, and to every effect. This principle, it will be shown, is established by the true construction of the act of limitations, and by the authority of adjudged cases.

It may be stated generally, on the first branch of this last question, that no court has ever decided since the statute of *James*, or the act of limitations of this state, that limitations do not apply to a case like the present. Let us examine this question on principle. How does an administrator, long after the death of the intestate, claim? Surely by relation back, not for one purpose only, but for every purpose. As to contracts and torts in the life time of the intestate, he represents only the rights which the intestate himself had, and he takes them precisely as he would have done had he administered the day after the death of the intestate. We have only to shew, that the cause of action accrued in the life-time of the intestate, and limitations run. The books say so *una voce*. This, however, it is said is a different case, and presents a new question, because here the cause of action did not accrue in the life-time of the intestate, but after her decease. And so in every other case of tort or contract arising after the death of an intestate, limitations, it is contended, only commences from the date of the letters of administration. If this case arises from a tort done after the death of the intestate, it sounds in damages, and it ought to have been laid on a tort done the administrator. The foundation of this case is, that by fiction and intendment, and the doctrine of relation, though the tort here complained of is of fifty years standing, yet the appellee is entitled to sue for

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it, as if it had been of yesterday; or in other words, that a right to sue at all only acquired yesterday, shall be construed back for fifty years. The doctrine of relation should never be called in but to the aid of justice—to give but not to divest rights. The court are called on to make the appellee the administrator of 1775. for some purposes, but for others to keep him to the date of his letters. This is surely not the conduct of even handed justice. The plea of limitations is not a bad plea. Lord *Mansfield* has declared it to be essential to individual justice and protection. Where, let it be asked, is the injustice of saying that this right of the appellee existed forty years ago? Can this court say to the appellee, we will give you all the privileges which the doctrine of relation can give you, but we will take care that you shall be exempted from its disadvantages? Will you take away from the appellant this ægis against vexation—the ægis of the act of limitations? This would be to make stern justice deviate from the dictates of duty. The property now in litigation was, at the death of Miss *Fishwick*, of trivial value. It has swelled into importance by the fostering hand of time. Who, let it be asked, is an administrator or executor? Do they acquire any beneficial right of property in the estates of the deceased? Or are they not bare trustees? And is the beneficial claimant to skulk behind this fiction of law? If there be creditors, or others, beneficially interested, are they not bound to assert their claims; and if they omit to do so, are they not as much guilty of laches as a legal claimant who omits to sue? The legislature, so far as regarded the act of limitations, intended to place the legal and the equitable claimant on the same ground. This, the reason and the spirit of the law alike demanded. What is the difference between a legal and an equitable claimant? Is there any in fact, except as relates to their means of remedy? And are not the means open to the latter as effectual for the recovery of his claim as those which are enjoyed by the former? Most unquestionably they are. Moreover, when we invoke in this case the aid of the statute of limitations, we use it in effect not against the administrator, but against the obsolete claimants. It is to them only it will injuriously apply, and they merit it by having been guilty of laches. From analogy too, and on principles of policy and justice, this court must, when they give the appellee, by the doctrine of relation, the capability of suing, also subject him, by the same doctrine, to the statute of limitations. It will be considered first on authority. It cannot be doubted, because such are the express words of the act of assembly, that a cause of action like the present, may be effectually barred by the act of limitations, where three years have elapsed since it originated, and before the institution of a suit. The distinctions which have been adopted in the construction of this statute, are, if the court will permit the digression, highly singular. For instance, it is said in the books, that the effect given by this statute to length of possession is not to

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transfer a right, but only to destroy a remedy. Now it would seem, that where you take away a man's remedy to the recovery of a right, you necessarily divest him of the right itself. For it must be obvious, that in every case where the law gives to the possessor of property the power of defending his possession, whenever he is able to show a certain length of possession, by that circumstance alone, it of course changes the estate he previously had in such property, from an uncertain and precarious one, into one of an absolute and indefeasible nature, and consequently in effect puts to death the right of all other persons to the same. By way of illustration, to what it is feared has been too obscurely stated, we know that to a writ of right sixty years is a bar, and to an action of ejectment twenty years possession is a bar. It is then a maxim in law that every right has its peculiar and fit remedy. In the instances referred to, however, neither the plaintiff in the one, nor the demandant in the other, have any relief for their several claims—the claims themselves, therefore, on the foundation of that maxim, may be said to have expired; and as these claims existed, and might have been recovered at any time before the lapse of the sixty or twenty years, during which period consequently the tenant or defendant held their respective estates by an uncertain tenure, at the end of such period that uncertain tenure is transformed into an absolute estate. When the true, or rather the original owner's remedy is taken away, his right is destroyed. To say that the right exists, although the remedy is lost, is contrary to every principle of common sense. The poet tells us "that you take away my life when you take away that by which I live." And with more truth it may be said that you take from me my right when you take from me my remedy. In order, however, to show that here we cannot avail ourselves of the plea of limitations, we have been told that no cause of action existed previous to the taking out the letters of administration, inasmuch as no species of abuse of property, except its total destruction, can amount to an act of conversion, unless the true owner thinks fit so to consider it; or, in other words, that nothing but a demand and refusal can make a conversion. It is admitted that a refusal is in most cases evidence of conversion, but it is denied that it is more than evidence, or that it is the only evidence. Where one is in the possession of property by the consent of the true owner, it is agreed that there can be no conversion till the true owner demands the restoration of the property, and the possessor refuses to make it. 2 *Esp. Dig.* 203. So where the heir of a person, who had held such a possession, continues to hold, he can be guilty of no conversion until demand and refusal, because the possession was with the consent of the owner. 2 *Esp. Dig.* 210. The court, however, has been referred, by the counsel for the appellee, to *Ball. on Lim.* 97, the case of a ship, for the purpose of showing, that although an act of conversion be once consummated, if there

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be a new act of conversion, on such new conversion an action may be brought; and although limitations would be a bar to an action for the first, it will not bar one for the last conversion, if within three years. This court have said, and thereby furnished a complete answer to this notion of the counsel for the appellee, that although the action of trover is not by name included within the act of limitations of this state, it is nevertheless embraced by its general provision for all actions on the case; because it is apparent that if this doctrine of election, if it may be allowed to be so baptised, is sanctioned, that limitations can never be taken advantage of as a relief against an action of trover. It would be to leave it to the election of the plaintiff in all such cases, whether he would be barred by such a defence or not. For notwithstanding he has made a dozen demands of the defendant for the property in dispute, and has met with as many refusals, he has only to make a demand at any time within three years before he institutes his action, and he will thereby have provided himself, if he again meets with a refusal, with a satisfactory answer to the plea of limitations. The act of limitations tells us that no action of trover can be maintained after three years have elapsed from the time the cause of action arose. The court would, by the adoption of this asserted doctrine of election, make the act of assembly "speak the word of promise to the ear, and break it to the hope." The fallacy of the reasoning by which such a principle is attempted to be maintained, consists in mistaking what amounts to a conversion. Was it ever before contended that an unequivocal act of conversion ever left the true owner, except as it regarded his remedy, at liberty so to consider it or not? An election of remedies is intelligible, but an election of conversions is, with all respect to the opposite counsel, absurd and preposterous. No authority whatever can be produced which even looks towards the establishment of such a principle, save only the very respectable authority of the attorney general, by whom it is now asserted. An authority, however, which I cannot avoid thinking we are more indebted for to professional ardour than to sincere conviction. As to the case of the ship, before noticed, taken *pro re nata*, it may be right, or it may be wrong. As an authority in point, whatever be the respect due to it, what does it amount to? Only that if a person commits an act of conversion on property, and afterwards parts with it, and comes a second time into the possession, and again converts it, that he cannot avail himself of limitations if such second conversion be within the limited time. It goes on the assumption, that there can be no second act of conversion where the party continues in the possession of the property. And the decision rests on the fact of the property not having remained in the possession of the defendant from the time of the first conversion to that for which the action was brought. The cases in 6 *Bac. Ab.* 679, 680, as to what amounts to a conver-

sion, will be now examined. These cases depend, it is apprehended, on the facts, of whether or not the first taking of the property is lawful; and if lawful, whether the right owner puts an end to it by making a demand of the property, or the taker puts an end to it by using it for a distinct purpose from the one for which he received it. For instance, if A lends to B a horse, the first taking here is a lawful one, and A could not sustain an action of trover against B, if nothing else ensued after the original taking; but as soon as he demands of B a return of the horse, and B refuses to make it, *eo instanti* does A become entitled to an action of trover. In such a case demand and refusal would be the only evidence of conversion, because no conversion could possibly have taken place, (supposing B to have used the horse as he engaged to do when he borrowed him.) until such demand and refusal. But if B borrows a horse of A to ride ten miles only, and instead of doing so he travels a hundred miles, this misuse is of itself a conversion, and A could immediately bring his action of trover without a demand and refusal. In this case the first taking was lawful, and became tortious by the malconduct of the defendant himself. The remaining way is, whether A takes a horse from B, without his knowledge, there the first taking is unlawful, and A may either consider it as a trespass or as a conversion; and if he considers it as a conversion, and institutes his action of trover, he may sustain it by proving the illegality of the first taking, without giving in evidence a demand and refusal. The conversion in such a case, therefore, originates with the first unjust taking of the property, and it is then the cause of action arises; and of course it is from that time that limitations run. In the next preceding case in the book referred to, the conversion, and therefore the cause of action and limitations, are to be traced back to the subsequent abuse of the property by the first taker, which being established also supports the action of trover without showing any demand and refusal. In the first supposed case, however, the conversion only arises after demand and refusal, as the first taking was legal, and the subsequent possession not made illegal by the misconduct of the borrower. It is at the time of such demand and refusal that the cause of action originates, and it is at that time that limitations attach. In all those cases the borrower makes himself an adversary holder the very moment he makes, what in law is called a conversion of the property. It will now be shown that this property was in one of the ways mentioned, converted either by the appellant, or by *Darnall*, the person under whom the appellant claims, more than three years preceding the institution of this suit. And as to this fact it appears almost impossible for any mind to entertain the semblance of a doubt; that is, for any mind free from the bias of professional zeal, which frequently leads the best and clearest understandings to the adoption of conclusions which, under other circum-

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stances, they would look upon as the mere "coinage of the brain." This zeal having led our learned opponents to controvert the fact which we have ventured to pronounce so perfectly plain, the great respect entertained for any opinion flowing from persons so much esteemed, must be an apology to the court for stopping a moment to make this fact, if it be possible, still more manifest. It has been said that *Darnall*, under whom the appellant claims, was only a fiduciary holder of this property. We admit that he might have been, if he had thought fit, such a holder, because as the friend of Miss *Fishwick* he had the right of collecting and preserving her effects at her decease; but does the proof show that he did so hold this property? But we will go farther, and admit that he did actually in the first instance so receive the property. And it by no means follows that he thereby obtained the right of using it for his own benefit, because the moment such an holder uses or makes profit of the property, that instant he becomes a wrong-doer, and from that period is to be dated the conversion, and consequently the limitations. What then is the proof as to the fact of the use of the property in dispute by *Darnall*, and of his applying it to his individual profit? Does it not appear by the testimony of Doctor *Beanes* and Mrs. *West*, that *Darnall* for twenty years before his death held and claimed *Dinah*, and her descendants, as his own? Was not such subsequent holding, therefore, a manifest act of conversion, even allowing that he originally received possession as a fiduciary holder? In the year 1786, twenty-six years prior to the issuing the letters of administration to the appellee, do we find *Darnall* professing to hold this property in trust only? There is not a scintilla of evidence to such a fact, so that for aught that appears to the court, not even his first taking of the property was fiduciary. Mr. *Muir*, in his letter of 1786, does not demand this negro woman as his own, but asks only for his share of Miss *Fishwick's* estate. In the year 1775 *Muir* thought it useless to administer on the estate, but in 1786 we find by his letter of that date, that he says unless something was shortly done he should be obliged to administer. There is a chasm in the proof from the year 1775 to 1786—as to the facts which intervened we are left entirely in the dark. We have it also in proof that *Darnall* always informed the appellant that this negro woman, and her children, were his own; that the appellant took this property nine years before the bringing of the present action, and that he held it *sui juris* cannot be questioned. To make *Darnall*, therefore, a fiduciary holder of the property, and to show that he remained such until his death, will avail our learned friends but little, unless they can also shew that the appellant received and held the property on the same terms. But to make the appellant a constructive trustee would be not only presuming that which there is no ground to presume, but would be drawing a presumption palpably in the face of the fact. We have thus, as succinctly as we possibly

could, attempted to answer the general reason which our friends say must prevent an action, situated like the present, from being barred by the statute of limitations; that is, because there was no person in *esse* capable of suing before the appellee administered on Miss *Fishwick's* estate. We will now proceed a step farther, and endeavour to satisfy this court, that not only is such an exception unwarranted by reason, but that there is no adjudged case which gives it sanction. To enable the appellee to sue, he is by fiction of law carried back for forty years, and we humbly trust we have satisfied the court, that if he is entitled to the benefit of that fiction, he must be also subjected to all the disadvantages which may be found to attend it. We are told, however, that the reason why this case should be saved from the operation of the statute of limitations, is precisely the same on which all the exceptions, expressly provided for by that statute, will be found to depend. We hope, on the contrary, that the court will think with us, that the very object of the statute demands that its protecting hand should be extended to save a defendant from the grasp of equitable, as well as from that of a legal claimant; and that there is no reason to justify the establishment of a distinction between them. That after time has run with its relentless pace, unappalled by danger, unimpeded by circumstances, and has destroyed in its course, or may be fairly presumed to have destroyed, all evidences of the dealings and transactions between the parties, it would be unjust, unequitable, and against the spirit of the law, to suffer one of those parties, at any remote epoch, to recover a claim against the other, because that claim chanced to be in its origin what is technically styled an equitable, instead of a legal one. Such an exception would obviously be for the benefit of cases of clear laches. Is there then any decided case to tie up the judgment of this court upon the subject? There is none, and this court are left to decide it, unshackled by the shadow of any such authority. The only case in which such a principle is to be found, is the one we have been referred to, of *Curry vs. Stephenson*, in 4 *Bac. Ab.* 479. The case is also reported in *Salkeld* 421, and in *Carthew* 335. The last of these reporters is justly entitled to the reputation he has acquired of accuracy, and it is by him that this case is most correctly stated. But neither in *Bacon*, *Salkeld* nor *Carthew*, is this principle stated to have been adopted by the court, for the case went off on a demurrer to the replication for the want of a proper conclusion. The principle, on which the appellee's counsel relies, is founded on the dictum of Lord *Holt*, and was not required to be decided by the case before him. Lord *Holt* refers, for the correctness of this dictum, to *Stansford's* case, cited in *Saffin's* case, *Cro. Jac.* 60, 61, and 5 *Co.* 123. No one can deny that Lord *Holt* was a good and estimable judge, but he was not authorised to declare the law *ex carthedra*. What then was the nature of these cases as reported in *Cro. Jac.* and 5 *Coke*?

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On turning to them the court will find that neither of them arose on the statute of limitations, but on the statute of fines, under which it was necessary to have an interest in the lands at the time of levying the fine, and because by relation the tenant was carried back to the date of the fine, which struck Lord *Holt* as being an analogous case, he therefore thought himself justified in pronouncing this celebrated dictum, on which, and on which alone, our learned friends can find support. But whether an administrator can be thus carried back to the date of his letters for one purpose, and not for every purpose, remains as yet, in *England*, a moot question, for which the court are referred to the remark of a respectable lawyer, (Mr. *Selwyn*,) to be found in 2 *Selwyn's N. P.* 712, where he says, *it seems* that the time of limitation must be computed from the day on which the letters of administration were granted; and in the *note* 42 he says, this doctrine stands on the single authority of Ch. J. *Holt*. And thus, we trust, we have fully convinced the court that this mighty, this stupendous principle, stands on no other foundation than Lord *Holt's dictum*, and that too pronounced when it was rendered totally unnecessary by the case then under consideration, and consequently there is no authority to prevent this court from giving to the subject the free exercise of its own judgment. The opposite counsel, however, fully convinced that the only authority on which they relied would be discovered, on examination, to be but "a baseless fabric," have undertaken to make an excuse for the obvious neglect of the appellee, and those whom he represents; and with this view they have drawn an affecting picture of their poverty and distress, and many other causes which created an almost unsurmountable obstacle to the maintenance of their rights. But on such a picture, and to such reasons, this court cannot look. The law alone is their guide, and that they must follow wheresoever it may lead them.

On the *third* bill of exceptions, whether the right of property is not quieted by length of time. The evidence now presented to the court shows a different case from the one before them on the former appeal. It is now proved that Miss *Fishwick* was above the age of 21 when she died. Other facts show, that from 1775 to 1782, there had been no definitive administration or settlement of the estate. Mr. *Muir* in 1775 presumed the estate might be settled without an administration. In 1782 the question was who should administer. *Darnall* was called upon to say what he would do. Nothing between 1782 and 1786 to show what had been done. In 1786 the discussion was to whom *Darnall* had paid the estate, as *Muir* then said he had not received his share. He did not ask *Darnall* by what authority he had paid; but he asks to whom he had paid. This implies that *Darnall* had authority to administer and to pay the estate. The whole question then was, have you administered the estate; have you paid it? In the

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last item in *Darnall's* account in 1775, a credit is given for the value of *Dinah*. Here then was a complete conversion. There was either a conventional administration by *Darnall*, or a legal one; and this court would presume a conventional administration to be a legal one, when demanded by the justice of the case. The court will presume a grant, release, fine and recovery, &c. things necessarily matters of record; and if so, it is not asking too much of them, in a case of personal property, after 40 years possession, that they should presume a good title in the holder. It may be remarked *in limine*, that the defendant is not tied down to the presumption asked for in this bill of exceptions. The *third* and *fourth* bills of exceptions taken together, on prayers that the plaintiff is not entitled to recover, will cover any presumption to which the appellant was entitled. It may be inferred that *Darnall* was appointed executor by Miss *Fishwick*, as her full age has been proved. The court may presume she made a will, constituting *Darnall* her executor; or that he might have been her executor in some other way. In *Toller*, 35, and 2 *Went. Off. Ex'r.* 4, a distinction is taken between a universal executor and a special executor. If it is necessary to presume a will or letters of administration it is sufficient. If the presumption is controverted by positive proof, then it is overthrown; but it cannot be defeated by presumptive proof. One presumption cannot drive out another. There may be a presumption against positive evidence, as where a valid deed is presumed, although one is produced which is defective. It is asking nothing against a legal presumption, that the court should presume that Miss *Fishwick* made a will appointing *Darnall* her executor; and although the court cannot believe it, yet as Lord *Mansfield* said, in *Eldridge vs. Knott*, *Cowp.* 214, "there are many cases where from a principle of quieting possession the court has thought that a jury should presume any thing to support a length of possession." How is the fact that this presumption is asked in the absence of all proof that *Darnall* was the executor or administrator? Is it not strongly implied in *Muir's* letter of 1786, calling upon *Darnall*, as administrator or executor, that he had acted in one of those capacities? The possession too of the negroes by *Darnall*. These circumstances show that it is not in the absence of all proof that the presumption is asked. There is nothing in *Muir's* letters in 1775 and 1782, inconsistent with the fact of their being a will appointing *Darnall* the executor; for he might not choose then to take out letters, although appointed executor. But without letters he could act in all matters, but obtain judgments; and as there were no debts due to the estate, suits were unnecessary. If the court may direct the jury to presume a fact in the absence of all proof, why not do it here where there is proof? But it is said there is opposing proof. What is that proof? It is nothing but the silence of the claimants. The inference drawn, that the claim of *Darnall* to the

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property was because of his debt against the estate, is without foundation. No such inference can be drawn from the evidence. His having a debt due to him is a strong circumstance for supposing he administered. For every essential purpose the same parties who existed in 1775, exist now. If *Darnall* was executor *de son tort*, he was liable to be sued by the creditors or distributees. He paid the debts and funeral charges, and took into possession and appropriated all the assets. His account shows what he did. Any one of these acts would have constituted him executor *de son tort*. There may have been other creditors than those whom *Darnall* paid. There is no suggestion that the plaintiff is either a creditor or distributee. The distributees, if they could not sue *Darnall* at law, might have filed a bill in chancery against him; but they omitted to do so. In fine, no case has ever occurred which called more imperiously on the court to interpose.

On the *fourth* bill of exceptions. There can be no question that the raising of negroes, until 25 years of age, is a full compensation for their services. This is an action sounding in damages, and the question is, when did the tort commence? The party had an election of one of two remedies. He might sue for the property, or for damages. In detinue there is no damages for the intermediate value of the property. In an action for a tort the measure of damages is the value of the thing, to be fixed when the damage arose, which is when the tort was committed. In this case the tort was consummated as far back as 1775, or at most in 1782.

On the *second* bill of exceptions. The plaintiff below offered in evidence a partial account of the administration on the estate of *W. Fishwick*. If any account was admitted in evidence it should have been the one showing a final settlement of that estate. The account offered in evidence is not a final, but is an intermediate account—an additional account. The defendant at the trial was taken by surprise; for he could not suppose this account would be produced. He had therefore no opportunity of producing the final account which closed the administration. From the silence of the parties interested in that estate a final account ought to have been presumed. *Darnall* was only an executor in right of his wife, and on her death he was absolved from the administration. The letter in 1782, speaks of the *small* estate left by Miss *Fishwick*, and yet this account was produced to show the large amount of property of which she died possessed, and to resist the prayer of the defendant to recoupe from the damages the debts paid by *Darnall*. Suppose there was a suit for the legacy, it would be no defence to say the legacy was set off against the debts, &c. set up to be recouped from the damages in an action of trover.

On the *sixth* bill of exceptions. The defendant, in order to recoupe from the damages, offered to show that

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Darnall was entitled, and the defendant as his representative was entitled to the benefits of those acts which *Darnall* had done and performed for the relief of the deceased, and of her estate. This was resisted by the plaintiff, and the court below directed the jury, that under no circumstances could the deductions be made. The general principle is, that the jury may recoupe such payments in the damages. But it is said this suit, not being against *Darnall*, the set-off cannot be allowed. The suit could be brought against the defendant in no other way, taking *Darnall* in the character of executor *de son tort*. He could be sued only as a naked wrongdoer. The record shows that the defendant claims and holds under *Darnall* under a general and particular devise of all the residue of his estate. If he can derive his title in any event, and has privity, he has privity for every purpose. Plain reason, and the common sense of the case show that the defendant is entitled to all the immunities and benefits to which *Darnall* would have been entitled if the suit had been against him. If *Darnall* did not make the payments, that was a question for the jury. But it is said that this doctrine of recouping in damages is entirely applicable to actions by creditors against an executor *de son tort*. It is admitted that *Wentworth* is good authority; but in the single instance cited he has not taken the proper distinction. The case in *Ventris* 349, does not bear out the position contended for on the other side. The general doctrine, as stated in 3 *Bac. Ab. Buller, Toller*, 2 *Blk. Com* and several adjudged cases in *Carthew* and *Modern Reports*, lay down the doctrine simply as to the form of pleading. Though an executor *de son tort* cannot plead *plene administravit*, yet he may give it in evidence, and nonsuit the plaintiff. It has been argued that he might sell the property, and pay the debts, but it is denied that he can keep the estate, and by paying the debts have an allowance for such payment. The nature of the action against him is for unlawful acts, and if one of his acts is allowed as lawful, why not allow all? The rightful executor, it has been said, must sell the property, and that he cannot keep it, although he has paid debts to more than its value. This would be depriving him of all discretion. Why not permit him to do an act beneficial to the estate? If he does advance his own money in payment of debts, why not permit him to keep the property instead of sacrificing it by a sale, the proceeds of which might not be sufficient to pay half the debts? *Toller*, 238. 1 *Com. Dig.* tit. *Administration*, (B 10,) 341. If the general doctrine is that an executor *de son tort* may pay debts and be protected, he must be protected in paying them in the manner which a lawful executor can do. If a rightful executor can retain, why may not an executor *de son tort?* That which a rightful executor may do, so may an executor *de son tort*. The authorities referred to in *Bull. N. P.* 48, go to sustain the general principle, that payments made by an exe-

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cutor *de son tort* shall be recouped in damages. But it seems that *Buller* doubts if this could be done in an action by the rightful executor against the executor *de son tort*. *Toller*, 365, is to the same effect, referring to *Buller N. P.* and *Parker vs. Kett*, 12 *Mod.* 471; and the last is one of the strongest cases to show that it may be done. But the authority of *Whitehall vs. Squire*. *Carthew*, 103, is full that on the general issue in trover an executor *de son tort*, although he cannot plead payments, may have them recouped in damages. This case shows that if he pays debts equivalent to the value of the property, he can keep it. But 2 *Blk. Com.* 507, is conclusive upon the subject. The doctrine of the writer is not to be impeached without imputing to him what never has been done. He lays down what is the general principle, after taking a view of all the authorities, and affirms the doctrine we contend for, and says that which was justifiable in a rightful executor would be so in an executor *de son tort*, except retaining for his own debt.

The opinion of the Court was delivered by

Chase, Ch. J The court are of opinion, on the *first* bill of exceptions, that no right of action vested in any person to sustain an action of trover for negro *Dinah*, and her descendants, before letters of administration were granted to the plaintiff in this suit; that the act of limitations could not begin to operate before letters of administration were taken out, and that the act of limitations did not attach until the demand and refusal, proved to have been made on the defendant on the 16th of June 1812. The court are of opinion, that the act of limitations is no bar in this suit, and they concur with the court below in refusing to grant the prayer, and to give the instruction to the jury, as expressed in the *first* bill of exceptions.

The court also concur with the court below as to the opinion expressed in the *second* bill of exceptions.

The court are of opinion, on the *third* bill of exceptions, that the proof offered by the defendant, when contrasted with the proof on the part of the plaintiff, does not warrant the said presumption; and this court concur with the court below in refusing to give the opinion and direction as prayed on the part of the defendant, and stated in the *third* bill of exceptions.

The court are of opinion, on the *fourth* bill of exceptions, that the plaintiff is entitled to recover damages to the amount of the value of *Dinah*, and her descendants, named in the declaration, together with damages for the detention from the time of the demand and refusal proved in this case; and the court below were right in their refusal to give the opinion and directions as stated in the *fourth* bill of exceptions.

The court are of opinion, on the *fifth* bill of exceptions, that all that evidence offered and mentioned in the statement of facts in the said exception in the following words,

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to wit: "That the said letters were granted to the plaintiff by one of the deputies in the office during the recess of the court, and in the absence of the witness. And the defendant thereupon swore *J. Burch*, the deputy who had granted the said letters, who stated that the said letters of administration were granted by him in the recess, and without the authority of the orphans court made known to him by the court in that particular case, but according to the usual practice of the office, which practice was known to and approved by the court. And the records of the said court were produced, whereby it appeared that the said court was not in session on the day of issuing of the said letters of administration to the plaintiff, and it did not appear that any application for said letters was made to the said court. But the plaintiff had applied to the register, during the recess of the court, some weeks before the granting the same, for letters of administration on the said estate," was illegal and inadmissible; because the direct tendency of such evidence was to impeach and nullify the said letters of administration, by showing that they were not granted by the orphans court of *Prince-George's* county, but by a deputy clerk in the office of the register of wills of that county, to whom the court could not delegate any such authority. That the said letters of administration were legally efficient until revoked, being clothed with all the requisite legal solemnities to communicate power and authority to the plaintiff to administer on the estate of *J. Fishwick*; and this court concur with the court below as to their admission of the preceding part of the evidence stated in this bill of exceptions.

The court concur with the court below as to the opinion expressed in the *sixth* bill of exceptions, this court being of opinion, that the said claims cannot be recouped in damages in this case, inasmuch as the defendant claimed the negroes in his own right, and in opposition and disclaimer of the trust under which they were transmitted to him; and inasmuch as the same can be adjusted on a final settlement of the estate of *J. Fishwick*, if the parties should elect to go into such adjustment.

It appears by the evidence, that *R. Darnall* was the father-in-law of *J. Fishwick*, having married her mother, who was living when *J. Fishwick* died. That *J. Fishwick* lived with her mother and father-in law, and died in his house, was possessed of *Dinah*, and a spinet, at the time of her death. From the evidence it is fairly and justly to be presumed that *Darnall*, consistent with his moral duties, possessed himself of the property of *J. Fishwick* as curator, to preserve it for the benefit of her creditors and representatives. That this fiduciary possession continued during his life; for at no time did he manifest, by his words or conduct, any intention to administer on her estate, but was particularly solicitous that some other of the legal representatives should administer. That *Darnall*, as a creditor, as one of the legal representatives, and as the hus-

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band of the mother of *J. Fishwick*, and being best acquainted with her affairs, was best entitled to the administration; but he pertinaciously adhered to his resolution, during his life, not to burthen himself with the administration, and determined to hold the property subject to the claim of her creditors and legal representatives.

It is apparent that it was as much the duty of *Darnall* to administer as any of the representatives, and no blame or neglect can be imputed to them which will not equally attach to him for the delay, and no inference from thence can be made in his favour. And these circumstances, combined with other facts in the case—such as there being no will, or proof that *Darnall* claimed as executor, preclude the presumption that he acted as executor, and fully administered the estate by paying debts, &c. That the defendant's title to *Dinah*, and her descendants, is derivative, being transmitted to him under the will of *Darnall* as residuary legatee, and he held them subject to the same trust that *Darnall* did, until the time of the demand and refusal.

A trustee cannot avail himself of the act of limitations; and it requires plain, strong, and unequivocal proof of his renunciation of the trust to divest himself of it for the purpose of benefiting himself by the act of limitations, to destroy the rights and interest of the *cestui que trust*.

Length of possession is the strong fact on which the presumption was prayed. The possession is accounted for by the proof, which shows how it was acquired by *Darnall*, how continued, and how transmitted to his representatives, not inconsistent with his moral duties, his probity or honour, nor in derogation of the rights and interest of the creditors and legal representatives of *J. Fishwick*, but for the preservation of the property for the benefit of her creditors and legal representatives. And by this proof is the presumption most conclusively repelled.

The defendant, as the representative of *Darnall*, as trustee or fiduciary possessor of *Dinah*, and her descendants, on an equitable adjustment of all rights, will be entitled to an allowance for all expenses incurred by him in maintaining and clothing *Dinah*, and her descendants, and for all monies due or paid on her account, on accounting for the use and possession of *Dinah*, and her descendants, and all profits and benefits resulting therefrom, to the time of the demand and refusal. In this way the characters of all concerned will stand unimpeached, and justice will be administered on the broad basis of equity.

JUDGMENT AFFIRMED.

HORNE, *et al.* Lessee, vs. LYETH.

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EJECTMENT in *Baltimore* County Court for a lot of ground in the city of *Baltimore*, No. 642, being part of a tract of land called *Lunn's Lot*. At the trial in the county court, it was admitted that *John Eager Howard* was, on the 2d of November 1782, seized and possessed of a lot or parcel of ground situate on *Howard-street*, in the city of *Baltimore*, beginning at the intersection of *Howard-street* and *Lexington-street*, and running thence, binding on *Lexington street*, 4½ perches, thence S. parallel with *Howard-street*, to *Dutch Alley*, thence E. with *Dutch Alley to Howard street*, and thence N. binding on *Howard-street* to the beginning, known and distinguished on the plat of the city by the No. 642, and is part of a tract of land known by the name of *Lunn's Lot*, long before that time granted to *Edward Lunn*. That *John Eager Howard* being so seized and possessed of said lot, by deed, duly executed, leased the same, with the appurtenances, to *Matthias Settler*, his executors, administrators and assigns, for the term of 99 years; and that *Settler* afterwards, by virtue of said deed and demise entered into possession; and being so possessed thereof afterwards, on the 12th of October 1785, did duly make and execute his last will and testament; and afterwards, on the 1st of September 1787, died in possession of the premises, leaving his said will in full force, whereby he bequeathed, among other things, as follows, viz. "Item. I give and devise to my grandson *Jacob Settler*, (son of *Matthias Settler*, Junr.) all that house and lot in *Baltimore Town* situate between the houses of Messrs. *James Allen* and *Charles Duhl*, to him my said grandson, his heirs and assigns, for ever; nevertheless I do hereby bequeath the use and benefit of the said house and lot to my son *Mathias Settler*, junior, during his natural life, and at his decease to descend as above directed. Item. I give and devise to my daughter *Catherine* the house and lot whereon I now live, with the annual income of three pounds two shillings and six pence current money, payable to me as ground rent from negro *Fanny*, and also the annual sum of four pounds sterling, payable to me as ground rent from Mr. *Wall*; all which property, and annual sums of money, I give to my said daughter during her natural life, and after her decease, I give the same to the heirs of my said daughter *Catherine;* and it is my express will and desire, that my said daughter possess and enjoy the said property from and after the decease of my wife *Catherine*, and not before. Item. I give and devise to my loving wife *Catherine*, all the rest, residue and remainder, of my estate, both real and personal, with all sums of money and interest due, or thereafter to become due, during her natural life, so that she do not waste any of the principal or original stock. And further, my will and pleasure is, that after the decease of my wife *Catherine* all my estate, both real and personal, (not specially herein before devised,)

a term of years in a lot of ground bequeathed it as follows. "I give and devise to my daughter C the house and lot whereon I now live; all which I give to my said daughter during her natural life, and after her decease, I give the same to the heirs of my said daughter C"—*Held* by *Baltimore* county court, that C was entitled to the whole of the unexpired interest in the term.

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be divided among my five children, (to wit,) *Abraham*, *Isaac*, *Jacob*, *Matthias*, and my daughter *Mary Strawman*, in the following manner, viz. Each of them first charging him or herself with the respective sums charged to them in my books or papers of account, and then respectively draw from the residue of my estate such sum as shall make my said four sons, and my daughter *Mary Strawman*, all equal share and share alike." It was further admitted, that the house and lot mentioned in the said will, and thereby devised by the testator to his daughter *Catherine*, is the house and lot and premises in the said declaration mentioned, and for the recovery of which this suit is prosecuted, and is a part of the lot of ground so demised to the said *Matthias*; and also that the wife of *Matthias* entered under and by virtue of said devise in the will of *Matthias*, and was possessed of the said house and lot so devised to her, and departed this life in the life-time of *Catherine* her daughter. It was also further admitted, that *Catherine*, the daughter of *Matthias*, on or about the 28th of February 1792, was duly married to a certain *Philip Horne*, by whom she had three children, to wit, *Henry*, *Jesse* and *Eliza*, all of whom were born before *Philip's* death, which happened on or about the 10th of January 1796; and further, that *Catherine*, the widow of *Philip*, was afterwards duly married to a certain *Jacob Diffenbaugh*, to wit, on or about the 22d of September 1796, and that after the death of her said mother, the said *Jacob* and *Catherine* having entered into the said house and lot and premises, and being possessed thereof, and of the remainder of the said term therein yet unexpired, under and by virtue of said demise, they, the said *Jacob* and *Catherine*, did on the 3d of December 1799, duly execute a deed, assigning unto a certain *Samuel Lyeth*, his heirs and assigns, the aforesaid house, lot and premises, and their said term therein. It was further agreed, that *Jacob* and *Catherine* both departed this life before the institution of this suit, leaving one only child, a daughter, named *Maria*, who also, before the institution of this suit, was duly married to *Henry Pope*, one of the lessors of the plaintiff, and is yet living; also that the said last mentioned *Catherine* departed this life on or about the 12th of September 1815, leaving at the time of her death the aforesaid children *Henry*, *Jesse*, *Eliza* and *Maria*, her heirs and representatives, of whom *Henry* is the oldest, and he and the said *Jesse* are two of the lessors of the plaintiff, and that the said *Eliza* was, before the institution of this suit, duly married to *Solomon Jones*, one other of the lessors of the plaintiff, and is still living. The leases, entries and ousters, in the said declaration stated and set forth, are admitted; also that since the commencement of this suit *Samuel Lyeth* hath died, as hath been suggested, having first duly made his last will and testament, and thereby devised the house and lot and premises aforesaid to *Kezia Lyeth*, his widow, during her natural life, and after her death to his son *John Lyeth*. It was also admitted, that

the property bequeathed by the testator, *Matthias Setler*, to his grandson *Jacob Setler*, (son of *Matthias Setler*, Junior,) is leasehold property. Upon this state of the facts the plaintiff prayed that the court would direct the jury to find for the plaintiff. 1818. Horne vs. Lyeth

Martin, (Attorney General,) and *Mitchell*, for the Plaintiff.

Pinkney and *Scott*, for the Defendant.

Dorsey, Ch. J. delivered the opinion of the Court. It is stated and admitted that *Matthias Setler*, being possessed of a term of years in a lot of ground situate in the city of *Baltimore*, by his last will and testament, bequeathed it as follows: "I give and devise to my daughter *Catherine* the house and lot whereon I now live, all which I give to my said daughter during her natural life, and after her decease I give the same to the heirs of my said daughter *Catherine*."

The question arising on this will is this—What interest did *Catherine*, the daughter of the testator, take under this devise? The counsel for the plaintiff have argued that she took only an estate for life, and that after her death, her children, the lessors of the plaintiff, were entitled to the residue of the term. On the part of the defendant it has been urged, that *Catherine*, the daughter, under the true construction of the devise, was entitled to the whole of the unexpired interest in the term.

If this had been a devise of real estate the case would be too clear for argument. Because where land is limited to a person for life, and after his decease to his heirs, or the heirs of his body, the remainder to the heirs, or heirs of the body, is immediately executed in the ancestor, who becomes seized of an estate of inheritance. So if there be a lease for life, with divers remainders over, remainder to the right heirs of the first lessee, or to the heirs of his body; this is a remainder vested in the first lessee for life; and after his death, and the determination of the intermediate remainders, his heir shall be in, as heir and not as a purchaser. For in those cases the words "heirs," or "heirs of the body" are not named as words of purchase, but only to express and limit the estate intended to be conveyed; and no presumed intention arising from the circumstance of the estate being limited, in the first instance, for life, will be permitted to control their operation as words of limitation. *Shelley's* case, 1 *Coke*, 96. 2 *Roll. Abridgment*, 417. *Fearne*, 28. Upon those general principles certain exceptions have been engrafted, in which the words, "heirs of the body," have been deemed to operate as words of purchase; as where the limitation was to A for life, and after his death, to the next heir male, and to the heirs male of the body of such next heir male, the devise to the heir was considered as a remainder to him by purchase; the word "heir" was in the singular number preceded by the word "next," and

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words of limitation were engrafted on it, which made the next heir the *terminus* or stock, by reference to whom the future succession was to be regulated. *Archer's* case, 1 *Coke* 66. *Fearne* 150. But if the words be heirs of the body, in the plural, in that case even words of limitation engrafted on them, if not establishing a new succession, inconsistent with the descent pointed out by the first words, will not convert them into words of purchase; as in *Shelley's* case, where the limitation was to E for life, and after his decease to the use of the heirs male of the body of E lawfully begotten, and the heirs male of the body of such heirs male lawfully begotten. 1 *Coke* 96. But if the superadded words of limitation would limit an estate of a different nature from that which the ancestors would have taken if the preceding words were construed as words of limitation, such preceding words may be construed as words of purchase. In such a case the general effect, or natural and legal import of the word "heirs," would be altered, abridged or qualified, by such subsequent express words of limitation annexed to them. So where heirs of the body, are by words of reference or qualification, explained or restrained so as to mean the first and other sons. *Lisle vs. Gray*, 2 *Lev.* 223. S. C. *Sir T. Raym.* 278. *Legate vs. Sewell*, 1 *P. Wms.* 90. So where the persons to take cannot take as heirs by that description, by reason of a distributive direction, incompatible with a course of descent; as where gavel kind lands were devised to A and the heirs of her body lawfully to be begotten, as well males as females, and to their heirs and assigns forever, to be equally divided between them, share and share alike as tenants in common, and not as joint tenants. In this case it was held, that the words heirs of the body did not operate as words of limitation, because they were corrected or explained by the words which followed, and were irreconcilable with the notion of descent; and also because there were words of fee engrafted on the words of limitation, which showed that the estates given to the children, and not the estate of A, were to be the ground work of succession of heirs; or in other words that the children of A were to be the *tirmini* for the succession to take its course from. So where the limitation is directed to the presumptive heir of the person on whom the estate for life is limited. As where lands were devised to B for life, and after his death to the heirs male of the body of B, now living, and such other heirs male or female as he should thereafter happen to have of his body. B had issue, a son C, then living. In this case it was adjudged that B took only an estate for life, and that the remainder in tail vested immediately in his son C. In this case the words "heirs male" were qualified by the appended expressions "now living," and C was clearly referred to, and designated under the character of presumptive heir. *Burchet vs. Durdant*, 2 *Ventries*, 311.

Limitations in marriage articles, as well as executory trusts, are also considered as exceptions to the general

rule. 1 *Eq. Ca. Ab.* 185, pl. 30. *Leonard vs. Earl of Sussex*, 2 *Vernon*, 526. *Papillon vs Voice*, 2 *P. Wms.* 471. So where the estate limited to the ancestor is an equitable or trust estate, and that to his heirs a use executed or legal estate, they will not incorporate; and if the estate for life is a legal estate, and that limited to the heirs an equitable estate, it is presumed the effect would be the same. 1 *Equity Cases Abridg.* 389. *Shapland vs. Smith*, 1 *Bro. Ch. Rep.* 75. It would be needless at this time of day to inquire on what foundation the words "heirs" or "heirs of the body" were originally considered as words of limitation, where a preceding estate of freehold was given to the ancestor. If the rule was introduced to secure to the lord of the fee the fruits of wardship and marriage, which he had a right to claim from the heir, who came into the tenure by descent, the rule must still prevail, although the abolition of the feudal tenures may have destroyed the reason of it. To disregard rules of interpretation, sanctioned by a succession of ages and by the decisions of the most enlightened judges, under pretence that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great land marks of property, but would introduce a latitude of construction boundless in its range, and pernicious in its consequences.

Having thus briefly examined what would have been the operation of this bequest, if the subject matter had been a frank tenant, (and in doing this we were necessarily led into an inquiry concerning the meaning and legal effect of the words "heirs," and "heirs of the body," when limited upon a preceding estate of freehold,) we shall now proceed to consider this bequest as applicable to chattel interests or leasehold property.

At one period of our law, if a term for years or chattel was bequeathed to one for life, and after his death to a third person, the ulterior limitation was considered as void, and the whole interest of the term or thing became vested in the first devisee; but in process of time, this doctrine was abandoned, and courts of justice, on grounds of general utility and public convenience sustained the superadded limitation as an executory devise.

This brings us to the question, Is there an executory devise in this case; or in other words, can the children of *Catherine*, the daughter, claim the interest in the term, on the ground that there is a limitation to them by way of executory devise after the death of their mother? And in making this investigation we shall first consider what would have been the true construction of this bequest if the words "*heirs of the body*" had been used instead of the word "*heirs.*" When a correct result is attained by this view of the case, analogical reasoning, in the absence of express adjudications, may enable us to decide with some degree of certainty on the precise case presented by the will. In the case of *Butterfield vs. Butterfield*, 1 *Ves.* 133, 154, the testator devised that £400 should be put out on good secu-

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rity for his son T, that he might have the interest of it for his life, and for the lawful heirs of his body; and if it should so happen that he should die without heirs of his body, it should go to his youngest son J B. Lord *Hardwicke* decreed that the son T should take the whole in the thing devised. In *Garth vs. Baldwin*, 2 *Ves.* 646, personal property was limited to trustees to pay the profits to *Edward Turner Garth* for life, and afterwards to pay the same to the heirs of his body. The Lord Chancellor says the case is reduced to this, a gift of personal estate to one for life and the heirs of his body—That must vest the property in him whether the testator intended it or not. *Atkinson vs. Hutchinson*, 3 *P. Wms.* 259. The Lord Chancellor declares that if a term of years be limited to A for life, remainder to the heirs of his body, A would take the whole interest. As where personal estate was given to L A P for life, and after her decease to the heirs male of her body lawfully begotten, and for want of such, with limitations over. The master of the rolls held that the whole interest vested in L A P. *Daw vs. Chatham*, 2 *Fearne* (347) 464. Interest of a sum of money given to A, and after his death to devolve to the heir of his body, with remainder over, vests the principal absolutely in A. *Robinson vs. Fitzherbert*, 2 *Bro. Ch. Rep.* 127. *Edward Webb*, in consideration of marriage between his son *Thomas*, and *Anne* his then wife, and £650 portion, did assign to a trustee the remainder of a term for 1000 years, upon trust, to permit the son to enjoy the same so long as he should live, and after their decease, to permit the heirs of the bodies of the said *Thomas*, the son, and *Anne* his wife, to be begotten. The wife died leaving issue; *Thomas* survived and sold the interest in the term; and it was held, that the whole interest vested in him, and that therefore he could legally convey the same. *Webb vs Webb*, 1 *P. Wms.* 132. The case of *Peacock vs. Spooner*, 2 *Vernon*, 43, is the only case to be found in the books that even seems to clash with the above authorities, and that case is distinguished from the foregoing cases on the principle that the limitations were contained in a marriage settlement; and in the case of *Garth vs. Baldwin*, 2 *Ves.* 646, the Lord Chancellor says, that it was determined in the House of Lords, but with a great variety of opinion among the judges, that it was a single case, and its authority shaken by the case of *Webb vs. Webb.*

From the preceding authorities it evidently appears, that if a leasehold estate is limited to one for life, the remainder to the heirs of his body, the whole interest vests in the first taker, and that the words "for life" will not be sufficient to restrain his interest to a life estate. But if words of limitation are superadded to the words "heirs of the body," such additional limitation is considered as indicative of an intent to give only a life estate. *Hockley vs. Mawbey* 3 *Bro. Ch. Rep.* 82. So, if the words "heirs of the body" are followed by words of partition or distri-

bution, the estate for life shall not be enlarged, by the force of the expression "heirs of the body," but the words of partition will be construed as indicative of an intent to give a life estate to the first devisee. *Jacobs vs. Amyatt*, 4 *Bro. Ch. Rep* 542.

By the irresistible authority of those decisions *Catherine*, the daughter, must have taken the whole interest of the unexpired term, if the devise had been to her for life, and to the heirs of her body. But it has been contended, that the word *heirs* may operate as a word of purchase, and that the court will so construe it to effectuate the intention of the testator. That the word *heirs*, in certain cases, may operate as a word of purchase, is too plain a proposition to be controverted. The doctrine of contingent remainders furnishes many instances of it. If an estate of freehold be limited to A, remainder to the heirs of B, it is a contingent remainder; and if B dies in the life-time of A leaving C his heir, C will take as a purchaser, and cannot take by descent, because the inheritance was never actually or potentially vested in his ancestor B. So if leasehold property is devised to A, remainder to the heirs of B, the representatives of B will, for the same reason, take as purchasers, because nothing was devised or given to B; and such is the principle of the decisions in *Holloway vs. Holloway*, 5 *Ves*, 399, and in *Gwynn vs. Muddock*, 14 *Ves.* 488, referred to in the argument by the plaintiff's counsel. So the words "heirs of the body," may operate as words of purchase; as if an estate for life is limited to A, remainder to the heirs of the body of B, if B dies during the life of A, leaving a child or a descendant of a child, such child or descendant takes by purchase, and cannot take by descent, because his ancestor had no seizen of the fee or frank tenement. But if an estate is devised to a man and the heirs of his body, the word "heirs" is a word of limitation. In every case therefore the question whether the words "heirs" or "heirs of the body" are to operate as words of purchase or of limitation, must depend on the context and subject matter. In the cases of devises herein before referred to, the words "heirs of the body," were held to be words of limitation, and it might have been contended, with as much force of argument in that case as the present, that as the words "heirs of the body" did, in certain instances, operate as a *designatio personarum*, they should be so construed in each of those cases, and therefore the heirs of the body should take as purchasers by way of executory devise. But this argument would have been unavailing, because the court, in construing the effect of limitation in bequests of personal property in general, keep in view their legal sense and meaning as applied to frank tenement, and hence the observation of the Lord Chancellor, in the case of *Knight vs. Ellis*, 2 *Bro. Ch. Rep.* 570. He says it must have occurred to the judges, who decided those cases, that under the idea of making the rules of decision as to lease-

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hold estate analagous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect; and then there can be no wonder that the court should try to get out of the technical rule, by any means it can. We ask what technical rule is here meant? The context shows that he refers to technical rules governing the limitations of frank tenements, whether the same be the rules of interpretation, established in *Shelley's* case, or elsewhere. And it was in this sense I have understood the learned counsel for the defendant, when in his luminous and eloquent argument he contended that the doctrine in *Shelley's* case had been applied as a rule of construction to ascertain the effect of limitations in bequests of leasehold estate. It has been admitted by the plaintiff's counsel, and the position has been established by a variety of decisions, that if the bequest be limited in such words as would create an estate tail in real estate, if applied to it, such words would vest the absolute interest in chattels in the first legatee. If such is the effect of a devise of a chattel interest to a man for life, remainder to the heirs of his body, why should not the same result be produced by a bequest to a man for life and to his heirs generally? If the words "heirs of the body" (which naturally point to children and their descendants) are considered as words of limitation, and enlarge the estate of the first devisee to an absolute interest, why should not the word heirs, so comprehensive in its signification, give as great an interest? If a frank tenement is limited to a man for life, and the heirs of his body, he has a limited and contracted interest—an estate in fee tail; but if it is limited to a man for life, remainder to his heirs, he has an absolute and unfettered estate. Why should the legal effect of those different limitations be so completely inverted when applied to chattel interests? Upon what principle can it be, that the more enlarged expression shall convey the least interest? It is said, that by construing the word "heirs" to be a *designatio personæ*, you fulfil the intention of the testator, evinced by his giving a life estate to *Catherine*, his daughter, and thereby secure a provision for the grandchildren, for whom the testator was under a natural obligation to provide. Refer to the case of *Butterfield and Butterfield*, and it will be found that this consideration had no influence with the Lord Chancellor, when he decided that the son of the testator should have an absolute interest in the money, which had been devised by the grandfather to the heirs male of the son, after the death of the son. There the grandfather, it may be presumed, intended to provide for his grandchildren, under the restricted limitation of "heirs of the body" of the son; but this intention was not legally evinced, and therefore the father took all, to the exclusion of his children. So in the case of *Webb and Webb*, where the father, by a marriage settlement, in consideration of a portion brought by his son's wife, limited personal property to his son for life, then to the wife of

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the son for life, and after their death, to the heirs of the body of the son and his wife. The son survived the wife, and it was decreed that the whole property vested in him. Here the issue of the marriage could claim no interest in the property settled, though the limitation was to the father and mother for life, and after their death to the heirs of their body. It might fairly be presumed that the children of the marriage were intended to be benefited by the marriage settlement, more especially as an estate for life only was limited to the father and mother, with remainder to the heirs of their bodies: Yet the Chancellor held, that the "heirs of their bodies" were words of limitation. If those cases are law, and their authority has not been called in question by the counsel for the plaintiff, how can the natural and legal sense of the word "heirs" in this case be restrained by the consideration of the supposed intention of the testator to provide for the children of *Catherine*, the daughter, founded on the circumstance of an estate for life being limited to her. The plaintiff's counsel have relied on the case of *Clare vs. Clare*, *Cas. temp. Tal.* 21, as decisive of the present case. There a devise to A of a term for life, and after his death to his issue, was held not to vest the whole interest in A, but that the issue of A should take after his death. Before this case can be considered as conclusively deciding the present case, it is presumed that the counsel for the plaintiff must prove a position, which he assumed in the course of his argument, and that was, that the words "issue," "children" and "heirs," were convertible terms. Unless this position is true, the case of *Clare and Clare* cannot affect the present question. That the word "issue" in its natural, and often in its legal sense, means children, and is therefore a word of purchase, no one will question; but that the word "heirs" either in its natural or constructive sense, generally means issue or children, must be denied; that there are certain cases in which the word "heirs," is used in the same sense as children or issue is evident, but in all those cases, it receives its restricted meaning, by being associated with words of reference or qualification, which show that it was not intended to be used in its legal sense. The word "issue" in grants is exclusively a word of purchase. In testamentary dispositions of real estate, it may be either a word of purchase or limitation, and in bequests of personal property, it is a word of purchase, as appears from the case of *Clare and Clare*, and the case of *Knight and Ellis* herein before referred to. But it is said that no decision can be found in which the word "heirs," in a case like the present, has been construed to be a word of limitation. This objection certainly is not entitled to weight, unless it can be shown that it has been adjudged that it is a word of purchase, or unless it can be proved by argument, founded on analogy and principle, that it ought to be so considered. The counsel on either side have not been able to refer to any decision

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on the precise point, and the court have endeavoured to prove, that all the analogies of the law are opposed to the construction contended for by the plaintiff. They therefore are of opinion, that the plaintiff is not entitled to recover, and refuse to give the opinion to the jury as prayed. The plaintiff excepted. Verdict and judgment for the defendant. From which judgment the plaintiff appealed to the Court of Appeals, but did not prosecute his appeal *(a.)*

(a) Though no opinion in this case was given by the Court of Appeals, the Reporters have supposed its publication would be acceptable to the profession, because of the evident care with which the judgment of the court below was pronounced, and the well merited reputation of the Judge by whom it was delivered.

JUNE, (E. S.)

HAMBLETON VS. TENANT.

Where the judgment of the county court is reversed by the court of appeals, and the proceedings are remitted, with a writ of *procedendo*, to the county court, and on a new trial that court give judgment on the same question, in accordance with the judgment given by the court of appeals—such judgment, on appeal, must be affirmed.

APPEAL from *Talbot* County Court. This cause was before this court at December term 1811, (3 *Harr. & Johns.* 233,) on the appeal of the now appellee, and the judgment of the county court was reversed, and the case remitted to that court, with a writ of *procedendo* directing a new trial. At the new trial in November 1816, the same testimony was offered in evidence by the parties which had been offered by them in the former trial. And to the reading in evidence the deposition of *E. N. Hambleton*, the defendant, as at the first trial again objected, on the ground of its being illegal and incompetent evidence, and that it was in the nature of parol evidence, tending to contradict or substantially vary the legal operation of the patent of the tract of land called *Neglect*, and prayed the court that it might not be read. But the court, [*Earle*, Ch. J. and *Worrell*, A. J.] were of opinion, (considering themselves bound by the judgment of the Court of Appeals, delivered upon the same point in the bill of exceptions heretofore taken in the same cause) that the deposition was legal and competent evidence, and ought to be read, suffered it to be read to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY, J.

JUDGMENT AFFIRMED *(b.)*

(b) The reason for affirming the judgment in this case is given by the court in *Clerklee vs. Mundell's Lessee*, (*Post.*)

JOHNSON vs. NEGRO LISH.

1819. JUNE, (E. S.)

Johnson vs Negro Lish

MB conveyed to his sister S B, by deed of gift, a negro girl called L, *to her and her lawful issue forever*, and if she died *without issue aforesaid*, the said negro girl, and her increase, to return to the estate of the donor. S B died without ever having had lawful issue,—*Held*, that the dying without issue generally is too remote, either in a deed or will; and that by virtue of the deed of gift, and by operation of law, the whole interest in the negro vested in S B

APPEAL from *Worcester* County Court. This was a petition for freedom by the appellee. At the trial she offered in evidence a bill of sale, or deed of gift, from *Morgan Bradshaw*, to his sister *Sarah Bradshaw*, dated the 6th of December 1793, duly acknowledged and recorded, and whereby, in consideration of the love, good will and affection, which he had and did bear towards his said sister, he gave and granted unto her, and to her lawful issue forever, a negro girl called *Lish*, about eight years old, with a proviso, that if *Sarah* should die without issue as aforesaid, *Lish*, and all her increase, should devolve and return to the donor's estate to all intents and purposes, as although the deed of gift had never taken place. The petitioner then proved the intermarriage of *Sarah Bradshaw* with *J. Melvin*, and his death sometime in the year 1810, leaving *Sarah*, his widow, in full life. She also offered in evidence the will of *Melvin*, dated the 13th of June 1810, whereby he devised to his wife *Sarah* all his estate, both real and moveable, during her natural life; and after disposing of his estate, after her death, bequeathing—"My will and desire further is, respecting my wife, that the one half of my moveable estate shall be at the disposal of my said wife at her decease; also the negro children *Eliza* and *Mehala*, together with any further or more children that the negro woman *Lisha* may have during the life of my wife, shall be all free at the death of my wife." She also proved the death of the said *Sarah* in year 1816; and offered in evidence her will, dated t[illegible] June 1816, whereby, amongst other bequests, she [illegible]queathed as follows, viz. "I give to *Moses W. Jones* my negro woman *Letisha*, my negro girl *Eliza*, and my negro girl *Sinah*, to serve him six months after my death, and then to be free from all servitude whatever." The defendant, (the appellant,) then proved that *Sarah Bradshaw* died without ever having had any children or issue, and that negro *Lish*, the petitioner, is the same negro *Lish* mentioned in the before mentioned bill of sale or deed of gift. He then proved his intermarriage with *Polly Bradshaw*, the daughter of *Morgan Bradshaw*, the original donor. The petitioner then prayed the court to direct the jury, that by virtue of the bill of sale or deed of gift aforesaid, the whole interest of *Morgan Bradshaw* in the said negro, and the absolute property therein, vested in *Sarah Bradshaw*; and that the petitioner, under the wills aforesaid, was entitled to freedom. Which prayer the Court, [*Robins* and *Whittington*, A. J.] sustained, and directed the jury accordingly. The defendant excepted; and the verdict and judgment being for the petitioner, he prosecuted this appeal.

The cause was argued before CHASE, Ch. J. and EARLE, JOHNSON and DORSEY, J.

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J. Bayly and *Wilson*, for the Appellant, stated that the question depended on the operation of the deed of gift made by *M. Bradshaw* to *S. Bradshaw*, giving to *S. Bradshaw*, and to her *lawful issue*, for ever, the negro *Lish*, with the proviso, that should *S. Bradshaw* die without issue, then the negro, and her increase, should devolve and return to his estate. They contended that *S. Bradshaw* was not entitled to the absolute property in the negroes, but to a limited interest only. They cited *Co. Litt.* 20. a, *(note 5.)* *Doe vs. Lyde*, 1 *T. R.* 596. *Goodtitle vs. Pegden*, 2 *T. R.* 720. *Wilkinson vs. South*, 7 *T R.* 555. *Hodgeson vs. Bussey*, 2 *Atk.* 90. *Higgenbotham vs. Rucker*, 2 *Call's Rep.* 313; and *Longhead vs. Phelps*, 2 *W. Blk. Rep.* 704.

Spence, for the Appellee, contended, that the absolute property in the negro passed by the deed of gift to *S. Bradshaw*. He cited *Fearne Con. Rem.* 366. *Higgenbotham vs. Rucker*, 2 *Call's Rep.* 313. 319. *Stafford vs. Buckley*, 2 *Ves.* 170, 183; and *Davidge vs. Chaney*, 4 *Harr. & M'Hen.* 393.

Earle, J. delivered the opinion of the Court. The only question in this cause arises on the construction of the deed of gift, mentioned in the record, from *Morgan Bradshaw* to his sister *Sarah Bradshaw*. The operative expressions in this instrument are, "to my sister, *Sarah Bradshaw*, and her lawful issue, for ever, and if she die without issue aforesaid, the said negro *Lish*, and her increase, to return to the estate of the donor;" and it is admitted that *Sarah Bradshaw* never had lawful issue, and consequently that she died without such issue. The doubted point is, whether negro *Lish*, and her increase, shall return to the estate or representatives of *Morgan Bradshaw*, who died it seems before *Sarah Bradshaw* his sister.

If the slave, and her increase, cannot return to the estate of *Morgan Bradshaw*, it follows that the gift to *Sarah Bradshaw* passed the absolute property to her in negro *Lish*, and of consequence that both *Sarah Bradshaw*, and her husband *J. Melvin*, had a right to manumit, or to make any other disposition in their pleasure of her and her increase.

The above expressions in the deed of gift are general, and in their obvious legal meaning extend to all the lawful issue of *Sarah Bradshaw*; and a limitation of a chattel, to take effect after an indefinite failure of issue, tends to a perpetuity, and is null and void. Negro *Lish*, and her increase, cannot return to the representatives of *Morgan Bradshaw*, unless the language used is restricted in its general sense by other words, which show an intention, that this property should return to the estate of *Morgan Bradshaw*, on the death of the donee without children or issue. It is in vain that I have sought for such restrictive words, or any circumstance in this case, to confine the general

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meaning of the language which characterize this deed of gift. Instead thereof there are many expressions employed, which go far to show that the property was not to revert, but upon an indefinite failure of issue in the donee; such are the expressions, "for ever,"—"negro *Lish*, and her increase, shall return"—they shall return to "the estate of *Morgan Bradshaw*;" all of which expressions seem to import that this property was not to return to the donor's estate on the death of the donee without issue.

JOHNSON, J. No greater interest than a life estate will pass by a deed of real property without words of inheritance. To the grantee, and his issue, passes only a life-estate; to the grantee and his heirs, or the heirs of his body, will pass a fee or fee tail. But in personal property the grant passes the absolute interest, where not otherwise expressed. If then the absolute interest passed by the preceding words, as that interest is to be defeated on a certain event, the question is, on what event? The deed describes that event to be a *dying without issue generally*, without words of restriction, which every decision, that can be produced, declares to be too remote.

In forming opinions on questions of this nature, we must keep in mind, that originally a gift of personal property, for even an hour, passed the whole interest—there could be no restriction—no limitation over. Now, limitations over are admitted within certain restrictions; but the dying without issue generally, has universally been determined to be too remote, either in a deed or will.

JUDGMENT AFFIRMED.

HAMBLETON'S EX'R. VS. HAYWARD.

JUNE (E. S.)

It is in the power of a debtor to sell and convey his property, and to deliver possession, and such sale, if *bona fide*, is valid.

The execution of a bill of sale of personal property, acknowledged and recorded agreeably to the act of 1729, *ch* 8, vests in the party the same interest he would have obtained, if the possession had accompanied the sale.

If a bill of sale is executed *bona fide*, the possession of the property by the vendor, of itself, under the act of 1729, *ch* 8, will not render it fraudulent and void.

APPEAL from *Talbot* County Court. A writ of *scire facias* issued on the 29th of April 1816, against the appellant, as executor of *Philemon Hambleton*, deceased, on a judgment obtained in that court by the appellee against the deceased in his life-time, in November 1811. The defendant, (the appellant,) plead three pleas. 1. *Ne unques executor*. 2. *No assets*; and 3. *Plene administravit*. The plaintiff, (the appellee,) replied the general replications to each of the pleas, and issues were joined. At the trial the defendant gave in evidence a bill of sale, duly acknowledged and recorded, made and executed, on the 30th of November 1810, in consideration of $590, by *Philemon Hambleton*, to the defendant, of certain negro slaves and other personal property, consisting of horses, cows, sheep, &c. on the farm on which the vendor lived. The plaintiff then gave in evidence that the debt for which the judgment mentioned in the writ of *scire facias* was rendered, had become due prior to the execution of the

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said bill of sale, and was due and existing at the time of its execution, and that the said negroes, and other property, remained in the possession and use of *Philemon Hambleton*, from the time of the execution of the bill of sale to his death, which happened in 1813; and that *Philemon Hambleton* died intestate, after whose death two of the negroes, namely *Jacob* and *Patt*, came to the hands and possession of the defendant, and were sold and disposed of by him. The plaintiff then contended before the court, that the bill of sale was fraudulent and void as to the plaintiff's claim, and the claims of all the creditors of *Philemon Hambleton*, whose debts became due prior to its execution, and existed at the time of its execution, inasmuch as *Philemon Hambleton* had remained in possession of the property as aforesaid, although the bill of sale had been acknowledged and recorded according to the provisions of the act of assembly of 1729, *ch.* 8, *s.* 5; and moved the court, upon the evidence, to direct the jury to that effect. And the Court, [*Earle*, Ch. J. and *Worrell*, A. J.] were of opinion, and so directed the jury, that the bill of sale was fraudulent and void as to the plaintiff's claim, and the claims of the other creditors of *Philemon Hambleton*, whose debts became due prior to the execution of the bill of sale, and existed at the time of the execution thereof, if in fact the property had remained as aforesaid in the possession and use of *Philemon Hambleton*, although the bill of sale had been acknowledged and recorded agreeably to the provisions of the said act of assembly. The defendant excepted. Verdicts for the plaintiff on the issues to the *first* and *second* pleas, and on the issue to the *third* plea *plene administravit*, except to the value of, &c. and that the sum of, &c. and costs, in the writ of *scire facias* mentioned, were justly due, &c. *Fiat* was entered for the said sum, &c. to be levied of the goods and chattels which were of the said *Philemon*, &c. to the value of the unadministered assets, and of assets *in futuro*, &c. From that judgment the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY, J.

Goldsborough and *Harrison*, for the Appellant. It is not stated that the bill of sale was executed with a fraudulent intention—the consideration was not called in question, nor is it stated that all the property, of which the vendor was possessed, had been conveyed. The question is, whether a bill of sale of personal property made to secure a debt, if the vendor retains possession of the property, is void as to creditors? At common law possession must accompany the sale. *Twyne's* Case, 3 *Coke*, 80. Possession remaining in the vendor is a *badge* of *fraud*. *Bulst.* 213. The possession by the vendor was *per se* fraudulent, and the vendee was not permitted to go into evidence

to account for the vendor's possession. *Edwards vs. Harben*, 2 *T. R.* 587. Until this decision it never had been determined that the vendor's possession was *per se* fraudulent. The act of 1729, *ch.* 8, § 5, substitutes the recording of the bill of sale for the possession, and it recognizes the common law, that the vendor's possession of itself did not defeat the bill of sale. It makes it void in future if it is not recorded as directed by that act. A bill of sale, where possession is delivered, is valid. It is the same under the act of assembly when acknowledged and recorded. They referred to *Hamilton vs. Russell*, 1 *Cranch*, 309, decided under the laws of *Virginia*. A vendee has a right to secure his debt, and a debtor may honestly prefer a creditor. *Holbird vs. Anderson*, 5 *T. R.* 235. *Estwick vs. Caillaud*, *Ibid* 420. *Nun & Ladbrooke vs. Wilsmore*, 8 *T. R.* 528. When the act of 1729 passed, the legislature considered the retaining possession as only *prima facie* evidence of fraud. That act made it absolute, unless the deed was recorded. The retaining of possession is only *prima facie* evidence of fraud. *Meggott vs. Mills*, 1 *Ld. Raym.* 286. *Cadogan vs. Kennett*, 2 *Cowp.* 432. *Barrow vs. Paxton*, 5 *Johns. Rep.* 258. *Beals vs Guernsey*, 8 *Johns. Rep.* 446. If the retaining possession was of itself conclusive evidence of fraud, there was no necessity for the act of 1729.

Bullitt, for the Appellee. The bill of sale is fraudulent as to creditors under the statute of 13 *Eliz. ch.* 5, being an absolute bill of sale, and the possession of the property retained by the vendor. It was not *bona fide*, because the possession was retained. The law implied a secret trust for the benefit of the vendor, and that trust made the conveyance void. 3 *Bac. Ab.* tit. *Fraud*, (C.) *Twyne's* Case, 3 *Coke*, 80. *Edwards vs. Harben*, 2 *T. R.* 587. The act of 1729, *ch.* 8, was not intended to affect the *prior*, but *subsequent creditors*. Against the last the deed is valid if acknowledged and recorded, but it is not so as to former creditors. A deed of gift, if acknowledged and recorded, is valid against subsequent creditors.

Chase, Ch. J. delivered the opinion of the court. At the time when the act of 1729, *ch.* 8, passed, it was in the power of debtors to make secret conveyances of property, and retain the possession, and although such possession presented grounds of suspicion against them, yet of itself it was not sufficient to authorise decisions against them as fraudulent. At that time, and now, it is in the power of debtors to sell and convey their property, and to deliver the possession; and such sales, if *bona fide*, are valid.

The act of 1729, *ch.* 8, was intended that speedy information should be given to every person of any transfer of personal property, when the party transferring the right retained the possession; such possession, unless the deed was

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acknowledged and recorded, of itself, as to creditors and subsequent purchasers, defeated the first conveyance.

The execution of the bill of sale, its acknowledgment and recording, vests in the party the same interest he would have obtained if the possession had accompanied the transfer of the right.

The court are, therefore, of opinion, that if the bill of sale, in the bill of exceptions mentioned, was *bona fide* executed, that the possession of the property contained in it, by the vendor, of itself, under the act of 1729, *ch.* 8, will not render it fraudulent and void.

MARTIN, J. dissented.

JUDGMENT REVERSED.

JUNE, (E. S.)

TRIPPE VS. FRAZIER, *et ux. et al.*

A S by her will dated in 1806 directed certain of her real estate to be sold by her executor, and out of the proceeds certain legacies to be paid; and among others, a legacy to one of the children of R H, which child died before the making of the will: and a legacy to a female charity school in *T* county, if there should be such an institution founded on good principle, otherwise to be distributed among the real distressed private poor of *T* county. There was no incorporated school in *T* county of the above description. The proceeds of the real estate sold exceeded the amount of the legacies bequeathed——*Decreed*, that the legacy left to the real distressed private poor of *T* county, shall be considered void for uncertainty, and the impracticability of correctly ascertaining the objects of the bequest. That the legacy to one of the children of R H. (the said child having died before the testatrix,) shall be considered as a lapsed legacy, and shall sink into the residuum of the estate for the benefit of the heirs at law of the testatrix. That the residuum of the estate remaining in the hands of the executor shall result as real estate to the heirs at law of the testatrix. That the legatees in the will are not entitled to interest on their legacies except from the day on which the executor sold the real estate.

APPEAL from a decree of *Talbot* County Court as a Court of Equity. *Ann Stevenson*, a married woman, being authorised by a marriage contract to make a will, did by her will, dated the 8th of October 1806, direct certain real estate to be sold by her executor, and out of the proceeds certain legacies to be paid. She died soon afterwards, and her husband survived her several years, and possessed the property, having a life-estate therein reserved to him under the marriage contract. After his death, the executor sold the property, as directed by the will, on the 11th of June 1814, and the proceeds exceeded the amount of the legacies. The complainants, (now appellees,) as the heirs at law of the testatrix, filed their bill against the executor, (the appellant,) claiming their shares or portions of the residuum, after the payment of the legacies. The defendant by his answer admitted the receipt of $8343 35, including the amount of the sales of the property devised to be sold, for house rent, and a debt due to the testatrix; that after deducting payments and disbursements amounting to $4815 76, there remained in his hands a balance due the estate of $3527 59. That the pecuniary legacies bequeathed amounted to $4390, all of which, that is, the principal without interest, he had paid to the persons entitled, with a very few exceptions, and that he was ready to pay the whole, &c. unless two of the said pecuniary legacies were void, and should not be paid at all; the one a legacy given one of the children of *R. Harrison*, who died before the making of the will, and the other a legacy given to a female charity school in *Talbot* county, if there should be such an institution founded on good prin-

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ciple, otherwise to be distributed among the real distressed private poor of *Talbot* county, there being no incorporated school in *Talbot* county of the above description. The answer further stated, that he had declined to pay interest on any of the legacies, not knowing whether the legatees were entitled to interest before the lapse of one year from the date of the letters testamentary of the defendant. He claimed an allowance for commission, expenses, &c. The facts stated in the bill and answer being admitted by both parties, and the questions of law arising upon them being alone submitted to the consideration of the county court, that Court, [*Earle*, Ch. J. and *Purnell*, A. J.] after argument on both sides—*Decreed*, that the legacy left by the testatrix, to the real distressed private poor of *Talbot* county, should be considered void for uncertainty, and the impracticability of correctly ascertaining the objects of the bequest. That the legacies to one of the three children of *R Harrison*, (the said child having died before the testatrix.) should be considered as lapsed legacies, and should sink into the residuum of the estate for the benefit of the heirs at law of the testatrix. That the residuum of the estate remaining in the hands of the defendant, should result as real estate to the heirs at law of the testatrix, the same residuum being a part of the net proceeds of the sale of a house and lot in the city of *Baltimore*, which the testatrix directed to be sold, in and by her will. That the complainants were the heirs at law of the testatrix, and as such entitled to such shares or portion of the residuum as were claimed by them in their bill of complaint; and that the defendant, after making all proper deductions and allowance for commissions, payments of debts, funeral charges and legacies, made and to be made, and costs and expenses incurred, and to be incurred, and other reasonable disbursements on his part, all of which were to be ascertained by the auditor of this court, should pay to the complainants their respective shares of the residuum then remaining in his hands, as executor and trustee of the testatrix, with interest thereon from the date of the decree; and that the legatees in the will of the testatrix were not entitled to interest on their legacies, except from and after the 11th of June 1814, that being the day on which the defendant sold the real estate of the testatrix. The defendant was, therefore, ordered not to pay interest on any of the legacies, except from and after the day of sale of the real estate. From that decree the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY, J.

Bullitt, for the Appellant. The question is, whether the legatees are entitled to interest on the legacies from the time of the death of the testatrix, or from the time the real estate was sold? He referred to *Maxwell vs. Wettenhall*,

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2 *P. Wms.* 26. *Lloyd vs. Williams*, 2 *Atk.* 108. *Atkins vs. Daubeny*, 1 *Eq. Ca. Ab.* 45. 2 *Fonbl.* 430.

Goldsborough, for the Appellees, referred to 2 *Fonbl.* 188, 431. *Crickett vs. Dolby*, 3 *Ves.* 10 to 13.

DECREE AFFIRMED.

JUNE, (E. S.)

HALE'S Adm'r. vs. HOWE'S Ex'r.

The county court has jurisdiction in cases where an executor or administrator is defendant, and the debt or demand does not exceed 30 dollars, and such cases are not cognizable before a justice of the peace.

APPEAL from *Dorchester* County Court. This was an action of debt for $30, and by a case stated it was admitted that the intestate of the defendant, (now appellant,) in his life-time, was indebted to the testator of the plaintiff, (the appellee,) in his life time, in the sum of $30, as stated in the declaration, and not more, and that the same was unpaid, and that for the recovery of that sum this suit is brought. It was further agreed, that if the court should be of opinion that the county court had jurisdiction, judgment was to be entered for the plaintiff for the above sum, and costs; but if on the contrary the court should be of opinion that the county court had not jurisdiction, but that the same was properly cognizable before a justice of the peace, then judgment of *non pross* was to be rendered in favour of the defendant, for costs. The county court gave judgment for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and EARLE, JOHNSON, and DORSEY, J. by

Lecompte, for the Appellant, and by

J. Bayly, for the Appellee. He insisted that neither a plaintiff nor a defendant, being an executor or administrator, could sustain a warrant, or be warranted before a justice of the peace, and referred to the act of 1791, *ch.* 68. *Wells vs. Newkirk*, 1 *Johns. Cas.* 228; and 3 *Hall's L. J.* 113.

JUDGMENT AFFIRMED.

JUNE, (E. S.)

PRATT VS. AYLER.

In an action of assault and battery, the declarations of the defendant of his criminal intentions against the plaintiff, are proper evidence to aggravate the damages sustained by the plaintiff, and as such ought to be considered by the jury.

APPEAL from *Queen-Anne's* County Court. Assault and battery by the appellee against the appellant. *Non cul* and *son assault demesne* were pleaded. The plaintiff gave in evidence at the trial, that on the 24th of December 1816, on his way to *Centreville*, he met the defendant on the pub-

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lic road, that the defendant approached him, and drew a small sword from a cane which he had in his hand, and as he approached, asked him to show him the knife with which he had stabbed his brother *E. Pratt*. That some conversation took place between them, and the defendant made a thrust at the plaintiff with the sword which he held in his hand, and wounded him in the breast, skin deep, from which a little blood issued. That some further conversation took place between them, and the defendant drew a knife, and told the plaintiff he would try blades with him, and made another thrust at him. The plaintiff also proved, that the defendant declared immediately afterwards, that he had made two efforts to kill the plaintiff, and that he would kill him. The defendant then proved, that about an hour before this affray he had seen his brother, *E. Pratt*, who had been wounded a short time before by the plaintiff; and that at the time he saw him, which was the first time he had any knowledge of his brother's situation, it was expected he would die of the wound. That when the defendant saw his brother, he was greatly agitated and incensed, and appeared not to be himself, and that he then declared he would have vengeance of the plaintiff. The defendant then prayed the court to direct the jury, that the plaintiff was not entitled to recover damages for any supposed criminal intention on the part of the defendant, but only for the injury done, and indignity offered, by the defendant to the plaintiff. But the Court [*Earle*, Ch. J. and *Worrell*, A. J.] refused to give the instruction, being of opinion that the declarations of the defendant, of his criminal intentions against the plaintiff, were proper evidence to aggravate the damages sustained by the plaintiff, and as such ought to be considered by the jury. The defendant excepted; and the verdict and judgment being against him he appealed to this court.

The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY, J.

Carmichael and *Chambers*, for the Appellant, cited 1 *Bac. Ab.* 156, 157. 1 *Hawk.* 264. 1 *East's C. L.* 411; *and* 5 *Com. Dig.* 582.

Harrison, and *P. B. Hopper*, for the Appellee.

JUDGMENT AFFIRMED.

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Pennington vs Bordley

PENNINGTON vs. BORDLEY, *et al.* Lessee.

APPEAL from *Cecil* County Court. Ejectment for a tract of land called *Painter's Rest*. The defendant in the court below, (the present appellant,) took defence upon warrant, and plots were made. At the trial the plaintiff offered in evidence the plots in the cause, and the surveyor's explanations of the same, and gave in evidence the certificate of survey of the tract of land called *Painter's Rest*, made for *Nicholas Painter*, on the 10th of Nov. 1677, and describing the land as "lying on the east side of *Chesapeake* Bay, and on the north side of a river called *Sassafras* River, beginning at a marked red oak standing on a bank by the side of the said river, and running up the said river S E for breadth 450 perches, to a marked red oak standing on a point of a neck called *Jugen Cabin Neck*, and running from said red oak with a line drawn N E into the woods for length 533¾ perches, then from the end of the N E line with a line drawn N W 450 perches, then from the end of the N W line with a straight line to the first marked red oak, containing 1500 acres more or less." The plaintiff also gave in evidence the certificate of re-survey of *Painter's Rest*, made for and in the name of *Nicholas Painter*, on the 17th of December 1678, "lying on the north side of *Sassafras* river, at the head of the said river, in *Cecil county*, beginning at a marked chesnut tree standing on a bank by a valley near the river side, being an easterly bounded tree of a parcel of land laid out for *Samuel Hill*, and from thence bounded with the river on the S by a line drawn E S E 75 perches, to a marked red oak standing on a bank by the river, being the *first bounded tree of the former survey*, and from the said red oak, bounded with the river and the main branch of the river, by a line drawn east southerly 475 perches, to a marked red oak standing by the side of a branch re-

A tract of land called *Painter's Rest* was surveyed in 1678, "beginning at a marked chesnut tree standing on a bank by a valley near the river side, being an easterly bounded tree of a parcel of land laid out for S H, and from thence bounded with the river on the S by a line drawn E S E 75 ps. to a marked red oak standing on a bank by the river, being the first bounded tree of the former survey, and from the said oak, bounded with the river, and the main branch of the river, by a line drawn E southerly 475 ps. to a marked red oak standing by the side of a branch, respecting a fork of the branch on the opposite side, & running from the said red oak, by a line drawn N E 535 ps. and from the end of the N E line, by a line drawn W N W 435 ps. and from the end of the W N W line, with a straight line 730 ps. to the first bounded chesnut."

A tract of land called *Heath's Range*, was surveyed in 1704, "beginning at a marked black oak standing at the end of the N E line of *Painter's Rest*, and running thence *with Painter's* line *W N W 435 ps. thence along and with Painter's last line S 36 W 210 ps.* to the heads of the lands surveyed from the river side, then N W along and with the heads of the said lands," &c. On the question, whether the expressions in the grant of *Heath's Range*, which call for the W N W and the home lines of *Painter's Rest*, imperatively bind *Heath's Range* with *Painter's Rest* on those two lines.

The county court were of opinion that the expressions in the grant of *Heath's Range* were imperative, controlling both courses and distances, and that the lines of *Heath's Range* must be either enlarged or shortened, so as to correspond with the true location of *Painter's Rest*; but that the jury were to decide on the facts, and that they were the sole judges what was the true location of *Painter's Rest*, and to determine in what manner *Heath's Range* was surveyed, whether agreeably to what the defendant contends to be the true location of *Painter's Rest*, or whether as corresponding to the grant of that tract as located by the plaintiff. On appeal *reversed*.

The end of the N E line of *Painter's Rest* is the beginning of *Heath's Range*. The grant of the last tract contains a double description of the place of beginning, and that ought to be adopted, which from the expressions of the grant is most certain and most conformable to the intention of the parties to be collected from the grant. If it could be done consistently with the proof, the location ought to be made so as to comply with those descriptions. Per *Chase*, Ch. J.

Heath's Range must begin at the end of the N. E. line of *Painter's Rest*, wherever the jury may find the same to be, and bind with *Painter's Rest*, as expressed in the grant, unless the boundary called for as the beginning of *Heath's Range* is proved, in that case *Heath's Range* must begin at the said boundary: and if such boundary does not stand in the W N W line, then a course must be shaped in the nearest direction to strike the said W N W line, and then the first and second lines of *Heath's Range* must bind on *Painter's Rest*, as expressed in the grant. Per *Dorsey*, J.

The exposition of deeds or grants is solely confided to the court, and their construction must be made on the expressions of the grant, and not on facts *aliunde*.

If a grant is susceptible of only one location, as to the description of the land intended to be passed, it is the sole and exclusive right and power of the court to decide on its true construction; and if the call, in the opinion of the court, is imperative, it is to be gratified, and the course and distance rejected.

A tree called for is not more certain than a line of a tract of land. They are to be rendered certain by proof, and can be identified in no other way—a tree being a natural and visible object, is not more capable of proof than a line.

specting a fork of the branch on the opposite side, and running from the said red oak by a line drawn N E 535 perches, and from the end of the N E line by a line drawn W N W 435 perches, and from the end of the W N W line with a straight line 730 perches, to the first bounded chesnut, containing 1630 acres of land more or less." The plaintiff also gave in evidence the certificate of resurvey of *Painter's Rest*, made for and in the name of *Thomas Bordley* on the 3d of October 1724, under a special warrant to resurvey *Painter's Rest*, surveyed on the 10th of November 1677, and resurveyed on the 17th of December 1678, "beginning at a marked chesnut tree standing on a bank by a valley near the river side, being an easterly bounded tree of a parcel of land laid out for *Samuel Hill*, and running from the said chesnut down the said valley, and up and with the river, S 62 W 14 perches, then S 29 W 11 perches, then S 86 E 24 perches, then S 29 E 12 perches, then S 8 perches, then S 35 W 10 perches, then S 17 E 26 perches, then N 54 E 64 perches, then S 77 E 34 perches, then N 80 E 11 perches, then N 82 E 8 perches, to a marked red oak standing on a bank by the river, *being the first bounded tree of the original survey*, and from the said oak, up the natural courses of the river and main branch, E 64 perches, then N 62 E 20 perches, then N 22 W 18 perches, then N 5 E 20 perches, then N 86 E 23 perches, then N 75 E 34 perches, then N 80 E 67 perches, then S 52 E 46 perches, then N 80 E 18 perches, then N 36 perches, then E S E 195 perches, to the side of a branch respecting a fork on the opposite side, *being the place where the third boundary tree stood*, which tree being gone there is now *bound* a *bound* white oak standing by the branch side, respecting a fork on the opposite side, and running from the said white oak N E 535 perches, then W N W 435 perches, thence a straight line to the beginning tree, containing 1616 acres more or less; also added two parcels of vacancy, the first beginning at the third bounded tree of the said land resurveyed, and running," &c. "containing 75 acres more or less; and the second parcel of vacancy beginning," &c. "containing 210 acres more or less; which said three parcels of land contain in the whole 1901 acres." The plaintiff also gave in evidence a patent for the last mentioned land, granted to *Thomas Bordley* on the 24th of October 1724. He also gave in evidence certificates of several other tracts, which it is not material particularly to notice.

The plaintiff also offered in evidence, that the said tracts of land, as also that part of the lands contained in the patent of *Painter's Rest*, dated 24th of October 1724, and the certificate of *Painter's Rest*, dated 3d of October 1724, called the second vacancies, were correctly located by him on the plots. He also offered in evidence, that the black oak tree called for as the beginning of *Heath's Range*, stood at the place marked on the plots by the red letter A, and that at that place a stone which was hewed

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at *Philadelphia*, and on which the letters H R ft. pt. was engraved or cut, at the instance of *Daniel Charles Heath*, the then proprietor of the land, except that part of *Heath's Range* included in a deed from *James Heath* to *Otho Othoson*, dated the 10th of May 1706, was about thirty years ago, by him said *Heath*, in the presence of a number of persons, fixed and placed to perpetuate the place where the beginning tree of *Heath's Range*, first part, originally stood. The plaintiff also offered in evidence that the lessors of the plaintiff had title to the lands contained in the said certificate of *Painter's Rest*, dated 3d of October 1724, and in the patent for said lands dated the 24th of October 1724. The defendant then also offered in evidence the plots and explanations of the surveyor, and the locations thereon made by him, (which are made part of this bill of exceptions,) and gave and read in evidence the certificate of *Painter's Rest*, dated the 10th of November 1677, and also the certificate of *Painter's Rest*, dated the 17th of December 1678; also the certificate of *Painter's Rest*, dated the 3d of October 1724; the certificate of *Green Spring*, dated 24th of October 1680; the certificate of *Martin's Nest*, dated 24th of October 1680; and the certificate of *Heath's Range*, the first part, dated 31st of August 1704; all of which are the same certificates which were read by the plaintiff, and which have been before inserted. He further gave in evidence the patent of *Heath's Range*, granted to *James Heath* the 18th of February 1705, also a deed from *James Heath* to *Otho Othoson*, dated the 10th of May 1706, for "all that parcel of land, being part of a tract of land called *Heath's Range*, the first part, lying at the head of *Sassafras* river, in *Cecil* county, surveyed for the said *Heath* the 31st of August 1704, beginning at the end of the first line of the said land, and running along the second line thereof S 36 W 210 perches, to the head of the lands surveyed from the river side, and is also along with the last line of *Painter's Rest* to the said head lands, then N W with the said head lands 60 perches, to the W corner of *Norland*, then along the head of *Daley's Desire* N 62 W 308 perches to the N E corner of *Colleton*, thence a right line to the first tree, containing 229 acres, or thereabouts." The defendant also, for the purpose of proving the true location of *Painter's Rest*, surveyed the 17th of December 1678, proved that *James Ford*, one of the witnesses who was sworn on the survey, is since dead, and then read in evidence his deposition, which had been taken on the survey to the third boundary of *Painter's Rest*, on the 25th of February 1814, which stated "that the white oak stump, at the side of the dry branch respecting a fork of *Sassafras* river, at the end of the third boundary of *Painter's Rest*, nigh to which a large stone is laid on the ground also nigh to a large black walnut tree, was shewn to the deponent by the late *Robert Milligan*, *John Gheas*, and *William Humphreys*, late surveyor of *Cecil* county, as a boundary of

Painter's Rest, but does not recollect which of the surveys it was said to be a boundary of." The defendant then prayed the court to direct the jury, that if they should believe the true location of the W N W line of *Painter's Rest*, resurveyed for *Nicholas Painter*, the 17th of December 1678, to be from the black letter C to the black letter D, that then, whether they shall find the beginning of *Heath's Range* to be at the black C, or at the red A, that the first line of *Heath's Range* cannot be extended beyond the black letter D, but must there stop, so that the second line of *Heath's Range* shall run along with *Painter's* last line 210 perches, to the head of the lands surveyed from the river side, according to the call in the certificate and patent of *Heath's Range*. And the plaintiff also prayed the court at the same time to direct the jury, that if they should be of opinion from the evidence, that at the time of making the survey of *Heath's Range*, the first part, *James Heath* considered the location of *Painter's Rest* as surveyed in 1678, to run from black A to black R, and thence to E, and thence N E 535 perches, and thence W N W 435 perches, and thence to the beginning, and actually marked a tree for his beginning at or near the end of the N E line at red A, and surveyed the first and second line of his survey according to such location of *Painter's Rest*, the jury ought to locate the tract of land called *Heath's Range*, the first part, agreeably to such location of *Painter's Rest*, whether such location be the true location thereof or not; and the Court, [*Purnell*, A. J.] upon both prayers gave the following instructions to the jury: At the trial of this cause, some terms past, a prayer was preferred by the defendant's counsel similar to the one now submitted by him, and in the consideration of that prayer it became necessary to determine on the construction of the certificate of *Heath's Range* in 1704, whether it contained such doubtfulness or ambiguity as to render it the peculiar province of the jury to determine, or whether the calls were imperative, and made it proper for the court to instruct the jury. It was contended, on that occasion, as in the present, that it was a subject solely for the consideration of the jury; but I entertained a different opinion, and did instruct the jury. The expressions of *Heath's Range* are, that it shall begin at a marked black oak standing at the end of the N E line of *Painter's Rest*, resurveyed for *Nicholas Painter*, December 17, 1678, and running thence with *Painter's* line, W N W 435 perches, thence along and with *Painter's* last line S 36° W 210 perches, to the head of the lands surveyed from the river side. These expressions I considered imperative, controlling both courses and distances, and that the lines of *Heath's Range* must be either enlarged or shortened, so as to correspond with the true location of *Painter's Rest*. And this opinion I must entertain on the present occasion, subject to a modification that could not be let in on the former trial, because the plots would not authorise it.

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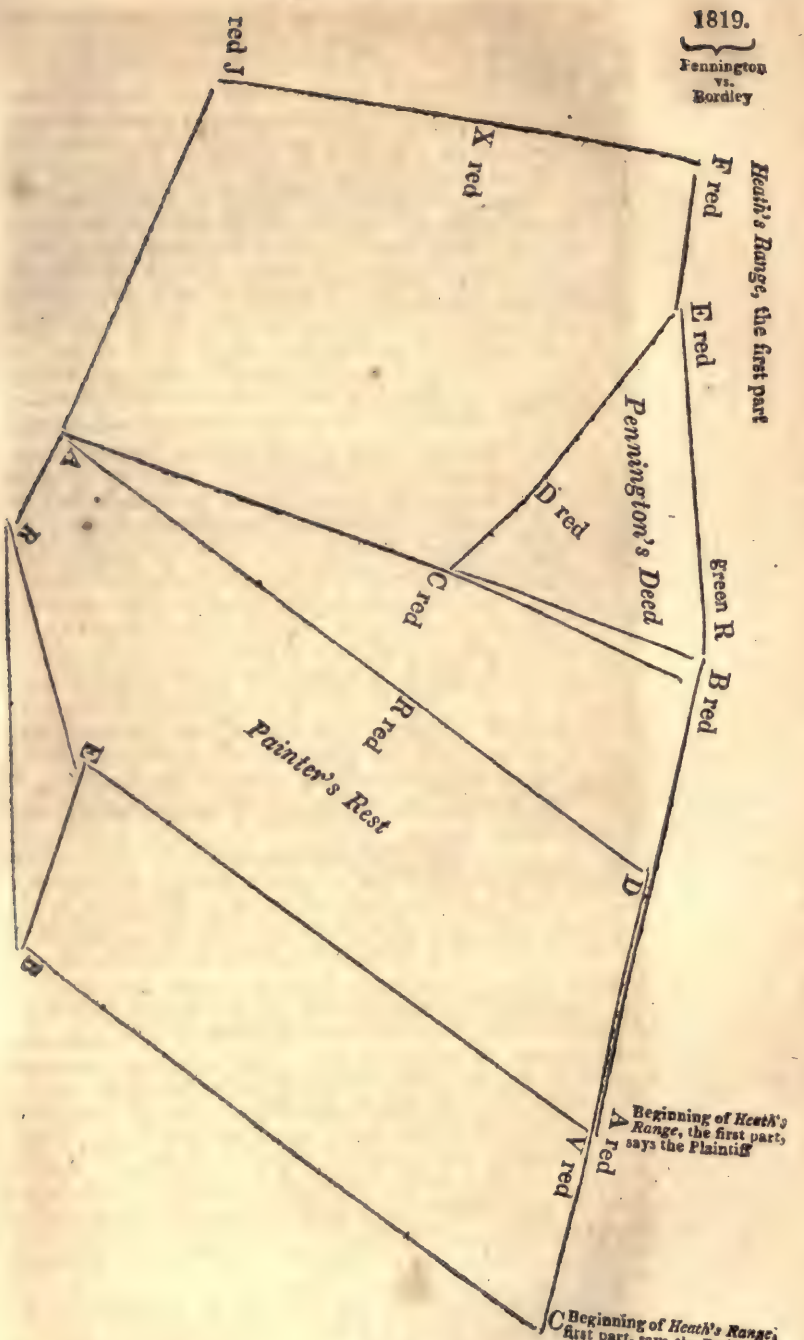
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It is therefore my opinion, that if the jury believe the true location of the W N W line of *Painter's Rest*, surveyed for *Nicholas Painter* on the 17th of December 1678, to be from the black letter C to the black letter D, that then, whether the jury shall find the beginning of *Heath's Range* to be at black C or red letter A, the first line of *Heath's Range* cannot extend beyond the black letter D, and that the second line of *Heath's Range* must run along with *Painter's* last line 210 perches, to the head of the lands surveyed from the river, unless the jury should be of opinion, from the evidence in the cause, that at the time of making the survey of *Heath's Range*, the first part, *James Heath* considered the location of *Painter's Rest*, as surveyed in 1678, to run from A to R, to E, to red V, to red B, and then to the beginning, and actually marked a tree for his beginning at or near the end of the N E line at red A, and surveyed the first and second line of his survey according to such location of *Painter's Rest*, then the jury ought to locate *Heath's Range*, the first part, according to such location. This last part of my opinion is induced by the decision in the case of *Tenant vs. Hambleton*, (3 *Harr. & Johns.* 233.) On all the facts it is for the jury to decide; they are the sole judges what is the true location of *Painter's Rest*. They are also to determine in what manner *Heath's Range*, the first part, was surveyed and taken up, whether agreeably to what the defendant contends to be the true location of *Painter's Rest*, or whether as corresponding to the certificate of *Painter's Rest* of 1678, as located by the plaintiff. These are all facts for the consideration of the jury, in which the court will in no sort interfere. The defendant excepted; and the verdict and judgment being for the plaintiff, the present appeal was prosecuted by the defendant.

THE PLAT EXPLAINED.

By the plots in the cause it appears that the plaintiff located *Painter's Rest*, surveyed the 17th of December 1678, beginning at A, running to R, to E, to red A, to green R, and then to A. The defendant located the same tract beginning at A, running to R, to B, to C, to D, and then to A. The plaintiff located *Heath's Range*, the first part, beginning at red A, running to red B, to red C, to red D, to red E, to red F, to red X, &c. The defendant located that tract beginning at C, running to D, to red R, to the head of the lands surveyed from the river side, &c. He located that tract a second way, beginning at C, running to red A, to red V, (near red A,) to D, to red R, &c. They differed as to the termination of the second line of *Painter's Rest*; the plaintiff contended that it ended at E, and the defendant that it ended at B.

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The cause was argued in this court at June term 1818, before CHASE, Ch. J. and BUCHANAN, JOHNSON, MARTIN, and DORSEY, J.

Carmichael and *Chambers*, for the Appellant. They cited *Norwood vs. Carroll et al. Lessee*, (5 *Harr. & Johns.* 163.) *Roseberry vs Carson*, (in the general court for the E. S.) *Trammell's Lessee vs. Nelson*, 2 *Harr. & M'Hen.* 4. *Helm's Lessee vs. Howard*, *Ibid* 82. *Paca's Lessee vs. Norwood*, *Ibid* 175. *Calhoun & Roger's Lessee vs. Hall*, *Ibid* 416. *Dougherty's Lessee vs. Denny*, 3 *Harr. M'Hen.* 430. *Hamilton's Lessee vs. Cawood & Blacklock*, *Ibid* 437. *Ashton vs. Hammond*, *Land. Hold. Ass.* 407. *Tenant vs. Hambleton*, 3 *Harr. & Johns.* 233. *Green vs. M'Clellan.* (*ante* 200:) and *Ridgely et ux. Lessee vs. Norwood*, 1 *Harr. & Johns.* 128.

Martin, (Attorney General) and *Hammond*, for the Appellee, cited *Helm's Lessee vs. Howard*. 2 *Harr. & M'Hen.* 82. *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 190. *Phillip's Evid.* 410. *Peake's Evid.* 116. 3 *Bac. Ab.* 388, 389. *Keech's Lessee vs. Dansey*, 1 *Harr. & M'Hen.* 21. *Chamberlaine's Lessee vs. Crawford*, *Ibid* 360. *Llewellins' Lessee vs. Fendall & Simmons*, *Ibid* 244. *Ridgely et ux. Lessee vs. Norwood*, 1 *Harr. & Johns.* 128. *Martin's Lessee vs. Muse*, (in the general court about 1793.) *Thompson et al Lessee vs. Brown*, 1 *Harr. & Johns*, 335. *Davis et al. Lessee vs. Battee*, *Ibid* 264 *Tenant vs. Hambleton*, 3 *Harr. & Johns.* 233. *Shield's Lessee vs. Miller.* (*ante* 1.) *Dougherty's Lessee vs. Denny*, 3 *Harr. & M'Hen.* 480. *Webb's Lessee vs. Beard*, 1 *Harr. & Johns.* 349. *Smith's Lessee vs. Volgamot & White*, 2 *Harr. & M'Hen.* 155. *Calhoun & Rogers Lessee vs. Hall*, *Ibid* 416. *Rench vs. Beltzhoover*, 3 *Harr & Johns.* 469. *Johnson vs. Hawn*, *Land. Hold. Ass.* 417. *Hammond et al. Lessee vs. Norris*, 2 *Harr. & Johns.* 130; and *Hamilton's Lessee vs. Cawood & Blacklock*, 3 *Harr. & M'Hen.* 437.

The cause was continued under a *curia* until this term, when the judges delivered their opinions seriatim.

CHASE, Ch. J. The question in this case depends on what is the true location of the tract of land called *Painter's Rest*, resurveyed in 1678. There can be no doubt about the true construction of the grant of that land; and the position of it must depend on the finding of the jury as to the place where the third boundary, the red oak called for, stood. If at black E, then the N E line will terminate at red V, if at black B, then the N E line will end at black C.

I consider the end of the N E line of *Painter's Rest*, the beginning of *Heath's Range*, the first part.

The grant of *Heath's Range* contains a double description of the place of beginning, and that ought to be adopt-

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ed which from the words and expressions of the grant is most certain and most conformable to the intention of the parties to be collected from the grant. The description is "beginning at a marked black oak," which forms the first part of the description, "standing at the end of the N E line of *Painter's Rest*," which forms the second part of the description.

Standing thus without any additional expressions designating more certainly the place of beginning, the tree would be preferred if it did not stand at the end of the line; but the following words, "running thence with *Painter's* line W N W 435 perches," &c. indicate plainly and unequivocally the intention to be to fix the beginning at the end of the N E line, and entitles it to the preference, because the calls "running thence with *Painter's* line," which are imperative, could not be gratified without establishing the beginning at the end of the N E line, and because it was the intention to make *Painter's Rest* the boundary to the extent of the said two courses. If it can be done, consistent with the proof, the location ought to be made so as to comply with both descriptions. From the beginning it is to run, "thence with *Painter's* line W N W 435 perches, thence along and with *Painter's* last line S 86° W 210 perches, to the heads of the lands surveyed from the river side." In case the 210 perches will not extend to the heads of the said lands, then the line is to be elongated, and the courses varied to gratify the said calls, which are imperative.

The end of a line is as certain as the tree from whence the line is to run, and excluding the idea of the variation of the compass, must invariably terminate at the same identical spot; and there could be only one location, because the course cannot be varied, nor can the number of perches be diminished or increased.

An allowance being made for the variation of the compass, is for the sole purpose of ascertaining the true position of the land according to the original survey, and divers locations are made by the contending parties according to their different views, and the jury decide on the proof which is the true location, according to the same kind of evidence which is admissible to prove calls; and the jury make such an allowance, according to the proof, which will fix the true location thereof, there being no certain rule established by law to guide them in making such allowance.

If the tree should be considered as best entitled to a preference, then a course must be shaped from the tree to the end of the N E line, to gratify the calls in the subsequent expressions, "binding on *Painter's Rest*," on the same principle that lines are elongated or shortened, and the courses varied, to comply with calls; and on the same principle, that where the beginning is a tree standing by the river side, and the tree is distant several perches from the river, and the subsequent course is then binding on the river, a course is supplied to run to the river to gratify the call.

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It has been contended by the counsel that this is the case of a latent ambiguity, and that the tree called for, if it does not stand at the end of the N E line, is entitled to the preference; that the call for the end of the N E line is not imperative, and that the jury are at liberty to give such a location to *Heath's Range*, the first part, as they may think right, without regarding the calls.

In all ejectments in which the controversy is about the location of the land, the land must be located according to the different views or pretensions of the litigant parties. To support these locations the evidence is introduced on which the questions of law arise, as to the true location of the land, which must conform to the true exposition of the grant.

The plot exhibits to the view of the court the position of the land, the courses and distances, and calls, that the court may decide on the true construction of the grant, and the legality of the evidence offered as applicable to it, and the legal sufficiency of it. The exhibition of the plot, on which the lands are located, can in no wise limit, control or change, the legal and constitutional power of the court in deciding on the construction of the grant.

A latent ambiguity is that kind of ambiguity which is concealed or not apparent on the face or inspection of the grant, but is created by the admission of parol evidence, showing that there are two tracts of land to which the description in the grant is applicable, which renders it uncertain which was intended to pass by the grant, and that uncertainty is removed by the same kind of evidence; and so in the case where thereare two trees set up to gratify the call, or two places set up as the head of the creek called for. In all these cases the jury ascertains and fixes the call according to the testimony legally admissible by the court.

If the grant, according to the principles established by the court, is susceptible of only one location, as to the description of the land intended to pass, it is the sole and exclusive right and power of the court to decide on the true construction of the grant; and if the call, in the opinion of the court, is imperative, the call is to be gratified, and the course and distance rejected. According to these principles, which are too firmly established to be shaken or controverted, the decision of the court, in the case of *Howard and Helms*, (2 *Harr. & M'Hen.* 82,) is right, in refusing to give the instruction to the jury, which was prayed by the counsel for the plaintiff, as to the true construction of the grant of *Cole's Harbour*. The expressions in the grant are as follows: "Beginning at a bounded white oak, (which was admitted,) and running west to the mouth of a small gut, and over the said gut, and bounding on the said N W branch for the length of 320 perches, then N N E 275 perches, then E 320 perches, bounded on the east by a line drawn S S W to the bounded tree." It was also admitted that the N W branch was truly delineated on the plot. According to the established principle, that an imperative call must be gratified, and the course and dis-

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tance rejected, if they do not correspond with the call, the plain and obvious construction of the grant of *Cole's Harbour* is to run from the beginning 320 perches, bounding on the N W branch, then N N E 275 perches, then E 320 perches, bounded on the E by a line drawn S S W to the first bounded tree. This is the only construction and location of which the grant is susceptible, and the court gave the right judgment in refusing to grant the direction of the prayer of the plaintiff's counsel, which was to run course and distance from the beginning, without regarding the call, *(bounding on the N W branch,)* which call unquestionably is imperative. The court, in expressing their judgment, are incorrect in the reasons they assign for it. The call, bounding on the N W branch, being imperative and binding, precluded all question about the true location of *Cole's Harbour*, which must be according to the call, rejecting course and distance. The description of the land intended to pass by the grant is definite and certain, if the call bounding on the N W branch is allowed to be imperative, and it is capable only of one location. If there had been two streams set up as the N W branch, one party contending for one stream, and the other party for the other, it would have been the case of a double location, and for the jury to ascertain according to the proof to which stream the expressions in the grant were applicable.

The courts since, in many instances, have been misled by the reasoning of the court in *Howard and Helms*, and appear to have adopted the reasons of the court as the judgment of the court.

The case of *Dorsey and Hammond*, *(1 Harr. & Johns. 190,)* is the case of an imperative call as to the grant of *Dryer's Inheritance*, and capable of only one location, and so the general court decided. The court of appeals reversed the judgment, adopting the reasoning of the court in *Howard and Helms*, on the ground that it was capable of a double location.

In the case of *Gibson's Lessee against Smyth*, *(1 Harr. & Johns. 253.)* the general court decided, that running with a tract of land was imperative, and that the course must be varied to gratify it; and this judgment was affirmed by the court of appeals. The question depended on the true construction of the grant of *Kirkham*.

In the case of *Thompson and Brown*, *(1 Harr. & Johns. 335,)* the call is for a beach tree, and is imperative. The grant of *Anthrapp* is capable of one location only.

It is observable that in the grant of *Painter's Rest* the red oaks, set up by the different parties, are distant from each other about two hundred perches, which is an additional proof that a tree called for is not more certain than a line of a tract. They are to be rendered certain by proof, and can be identified in no other way; a tree being a natural and visible object, is not more capable of proof than a line. The tree was visible only to the surveyor and chain-carriers at the time of the survey, and all the knowledge

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that can be obtained of it is derived from that source, being transmitted down by hearsay, the most vague and uncertain of all proof; and it is well known that opinions and misunderstandings of what was communicated, are substituted in the place of facts, not unfrequently, which is the cause of so much contest about the tree called for. The true reason for giving the preference to calls, is assigned in the case of *Norwood vs. Carroll, et al. Lessee. (5 Harr. & Johns.* 153,) on the principle that such construction was most beneficial for the grantee.

If the grant of *Cole's Harbour*, in the case of *Howard and Helms*, is to be considered as a grant susceptible of a double location, and the reasoning of the court adopted as the law, then that great principle of giving a preference to calls, generally recognized, and firmly established, will be subverted, and there is no case but what must be submitted to the decision of the jury, from whose verdict there is no appeal, and the power and jurisdiction of the court to decide on the true construction of grants would be transferred to the jury. The necessary result would be uncertainty, and endless litigation; one jury would decide according to calls, another according to course and distance; ejectment would follow ejectment, until the weaker party, worn out by anxiety, and oppressed by the heavy expenses attending ejectments, must yield to his opulent and powerful neighbour.

Buchanan, J. *(a)*. My opinion is, that the judgment of the county court ought to be reversed. The case of *Kirkpatrick's Lessee vs. Kyger*, 1 *Harr. & Johns.* 298, *Howard vs. Moale, et al. Lessee*, *Norwood vs. Carroll, et al. Lessee*, *Rench vs. Beltzhoover*, *Shields' Lessee vs. Miller*, and *Green vs. M'Clellan*, all in this court, are in point, and are cases of calls by junior tracts of land, not by natural or fixed artificial boundaries, but to *lines* of elder tracts.

Johnson, J. The question submitted for the decision of the court in this case is, in what manner a tract of land called *Heath's Range* ought to be located.

On a careful examination of all the authorities cited at the argument, and all others I have been able to find having relation to this question, it seems to me very evident that irreconcilable decisions have been made in the county court, in the general court, and also in the court of appeals.

Since I have been on the bench my invariable rule has been, in the trial of cases coming before me, first to ascertain which of the parties has the merits on his side, and having discovered that, to decide in his favour, unless I find myself hindered from doing so by certain and well es-

(a) Buchanan, J. being prevented by indisposition from attending the court at this term, communicated this opinion in a letter to the Ch. J.

tablished principles of law. That cases do sometimes arise where courts of law find themselves unable to extend relief to the party justly entitled to it, because of some fixed principle of law, must be admitted by those conversant with their proceedings. The less frequent such cases occur, the more pleasing and satisfactory must be the duty of those who have the law to administer. I have, and shall, therefore, ever yield relief to the claims of justice in the absence of clear and indisputable rules of law; where those rules do exist I must, of course, be bound by them. But I do not think it my duty, as surely it is not my inclination, to shut my ears to the call of justice, unless forced to do so by law cogent and inflexible. With these preliminary remarks I will proceed to the investigation of this case.

The purchaser of land, whether from the community or an individual, ought to obtain, in justice, the very land he purchases, and if there be any mistake in the instrument of conveyance by which such purchase is intended to be consummated, by which the purchaser may be thrown off the land purchased, though he might be cast on other land belonging to the vendor at the time of the purchase, and which the vendor may be willing to substitute for the part actually sold and intended to be conveyed, yet a power should exist somewhere by which such mistake might be rectified.

If a person affected by such a mistake is entitled to relief, and should not be compelled to take other land belonging to the vendor, how much stronger claim has he to protection, who, by a similar mistake, is prevented from obtaining any land at all—who is shut out, not only from the land he intended to purchase, but has no other land given him in lieu of it?

It is presumed that no one can question the propriety of granting relief in such cases. It may, however, be urged, that relief in cases of that description, cannot be given by courts of common law, they being bound to administer justice according to clear and established principles of law, their hands being tied by the peremptory directions of the law; and that those rules had better be adhered to, though individual loss should be thereby sustained. That there are cases where the rules of law are so rigid, as to produce individual injustice in courts of common law, and to force the parties to go elsewhere for relief, is most certain; and it is also certain, that even in courts of equity, which are less fettered by positive rule, redress in all cases cannot be obtained. The good of the community, however, and the advancement of individual justice, are best promoted by confining those rules to cases over which their dominion is already most clearly established. With these principles for my guide, I approach the consideration of the question in this case, viz. In what manner the tract of land called *Heath's Range* ought to be located?

On the 31st of August 1704, *Heath's Range*, contain-

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ing 1850 acres of land, was surveyed. The description of the survey, so far as it is material to the question before the court, was as follows: "Beginning at a *marked black oak standing at the end of the N E line* of *Painter's Rest* resurveyed, and running with *Painter's* line W N W 435 *ps.* thence along and *with Painter's last line*, S 30° W 210 ps. to the head of the lands surveyed from the river side, then *N W* along and with the heads of the said lands 60 ps. to the west corner of a tract called *Norland*, and to the east corner of another tract called *Dayly's Desire*, then along the head of that tract N 62° W 308 ps." &c.

The material description of *Painter's Rest* resurveyed, the first tract called for, is "Beginning at a bounded chesnut, and running" a course specified in the certificate, (which is immaterial to the present question,) "to a marked red oak, being the first bounded tree of the former survey, and running from thence with the river by a line drawn southerly 475 ps. to a marked red oak, from thence *by a line N E* 535 ps. then W N W 435 ps. and then with a straight line 735 ps. to the beginning." On comparing the above certificates it will be perceived that a material difference exists between them, in relation to the description of the spot where the N E 535 ps. line of *Painter's Rest* resurveyed terminated; the one describing *the end* by the number of perches alone, and the other calling for a *marked oak* standing at the end of that line; the one calling to run the next W N W line 435 ps. from the *spot* where the 535 ps. line ended, the other calling to run the same course 435 ps. from where the tree stood. If then, when *Heath's Range* was surveyed the parties were mistaken as to the *place* where the N E line terminated, and fixed the boundary of the beginning of *Heath's Range* in the W N W line of *Painter's Rest*, and not at the commencement of that line, (the same being the termination of the N E line,) it must, of course, follow, that to the same extent the beginning was set along the W N W line, the corresponding line of *Heath's Range* must go beyond the termination of the same line of *Painter's Rest*, and of course the next line of *Heath's Range*, not being at the same termination with the line of *Painter's Rest*, could not run with its last line the number of perches called for in the last survey.

It is contended, on the part of the appellant, that the first line of *Heath's Range*, no matter where the tree called for as its beginning stands, must terminate with the W N W line of *Painter's Rest*, without regard to the manner in which that land was run at the time *Heath's Range* was taken up.

It is evident that if *Heath's Range* must be so run, and its beginning is not at the end of the N E line of *Painter's Rest*, the land actually surveyed, and the land designed to be purchased, will not pass by the grant. Here it may be asked, why shall the expression in the second course, calling to run a described course with the last line of

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Painter's Rest resurveyed produce such an effect? Is it because thereby more precision and certainty is obtained as to the real location of the land, or is it because in doing otherwise the record is contradicted, and by letting in extrinsic circumstances, confusion and uncertainty are produced with regard to the position of the land granted? No such consequences can follow.

To my comprehension all the evils that can arise take their origin from limiting and confining a junior survey, containing a reference to the lines of an elder tract to the true location of such elder tract, and in not permitting the junior survey to embrace the land it would have comprehended, by running the elder survey at *the trial of the cause*, in the *same way* it was run when the junior survey was made. Can the W N W line in the certificate of *Heath's Range*, calling to run the same *course and distance* with *Painter's Rest*, deviate in the smallest degree from the same ground it would have covered, supposing the words *with that line* had been omitted? Were there, at the time *Heath's Range* was surveyed, any *marks or traces* on the ground to shew at what place the line of *Painter's Rest* run, when *Painter's Rest* was taken up? Or was not the word *with* inserted because the commencement, course and termination of the two tracts, were supposed to be and were laid off as the same?

But the question for the decision of the court is, admitting the tree called for as the beginning of *Heath's Range* is not the end of the N E corner of *Painter's Rest*, and of course not at the commencement of the W N W line of that tract, the W N W line of *Heath's Range must of necessity*, (not may only,) end with it.

Again it may be asked why must it there end? Doth it give greater certainty of locations by binding the position of a junior survey so as to make it tally with the original location of the tract called for, when that original location, at the time of the last survey, was unknown to all those engaged in taking up the land? All that can be said, as to the expression *running with the last line of Painter's Rest*, is that having in the preceding course begun at, or supposed to have begun, run with and terminated at, the same place, the next line would run with the last line of *Painter's Rest*, but as they do not terminate at the same place, they cannot run together unless the preceding line of *Heath's Range* is diminished in its distance 180 ps. And must the call, such as it is, produce that effect?

On principles of justice the land intended to be bought and sold ought to pass by the conveyance, but if the lines of the grant are to be diminished, the whole land cannot pass. Where are these firmly established principles to be found, that will increase or diminish the distance when no visible objects are called for and *explicitly described as boundaries*? But when even *such visible objects* are mentioned in the certificate, if not described with that absolute certainty to make them *unquestionable* boundaries, then, whether they *bind or not* must depend on the opinion of the

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jury, from all circumstances, ascertaining whether or not the land, when run out, extended to such visible and natural objects.

If then, on principles of equity and justice, the land intended to be purchased should pass, and that no greater certainty to the location of land is obtained by restraining the course and distance of a junior survey, calling to run to and with the lines of an elder survey, nay, that locations are more uncertain in proportion as you drive the parties claiming under them back to more antient dates, than they would be if the more recent surveys were allowed to control; it only remains to be considered, have the decisions given to such expressions that obligatory force that this court is now bound to yield to them? Although all the decisions are not to be reconciled, yet it appears to me, after a careful examination of them, their weight is in favour of the opinion pronounced by the judge below. The first description of cases that I shall notice are those where the jury were left to ascertain the location of the land when the expressions used, even in regard to visible natural objects, were so used as not *evidently* to disclose that such objects were described as bounds. In such cases, whether bounds or not, is made to depend on the running at the time the land was taken up, to be ascertained by acts of possession, and every other circumstance by which the actual running in the opinion of the jury is established. In *Helm's Lessee vs. Howard*, 2 *Har. & M'Hen.* 82, it was determined that a grant calling to run *up* or *along* with a river, and *not* calling to run *with* or *bounded by* the river, was a proper subject for the consideration of the jury, whose duty it was to bind with the river or not as they should find the land to have run *when taken up.*

In *Martin's Lessee vs. Muse*, (General Court, E. S. about 1793,) a tract of land called to run to a tree, at the river side, and then *down* the river to a tree, a course and distance expressed. By running the course from the one tree to the other, a piece of vacant land was made to appear between the line and the river. This was also left to the jury, and there was no appeal from the decision. The general court were consistent in these decisions. In *Davis' Lessee vs. Battee*, 1 *Harr. & Johns.* 264, the general court determined that *Selby's Marsh bound* on the river, if the jury believed that the river was *truly located.* The court of appeals *reversed* the decision, on the ground that the expressions in the grant were *doubtful*, and were therefore proper to be left to the jury. In *Dorsey's Lessee vs. Hammond*, 1 *Harr. & Johns.* 190, the question arose on a tract of land calling to begin at a tree on the east side of *Patuxent* river, and then running into the woods a certain course to another bounded tree, and then another course to a bounded tree on *Patuxent* river, and then running and *binding on Patuxent river* a short course and distance, and then several other short courses, until they approached the beginning tree on *Patuxent* river; the general court determin-

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ed that the *first short course* was bound by the river, and that all the others *must* run course and distance, with such variation as the jury might allow, except the last that called to run to the beginning. The court of appeals reversed the judgment, on the ground that the jury should ascertain how the land was run, *and if run with the river when the land was taken up*, the river must bound the survey.

Other cases exist confirmatory of the principle, that where the expressions used are doubtful, whether the object expressed was intended to bind or not, are for the consideration of the jury. On this subject only one other case will be stated. In *Thompson's Lessee vs. Brown*, 1 *Harr. & Johns.* 335, the court were called on to say, when a line called to run from a tree on the river side *up the river* to another tree on the river, any land lying between the river and that line passed by the grant. The general court determined that it did not. The court of appeals reversed this opinion, the subject being proper for the consideration of the jury.

The next class of cases to be referred to are those where the lines of junior surveys call for the lines of elder tracts. These decisions, I apprehend, support the judgment pronounced by the county court in this case.

In *Ridgely & wife Lessee vs. Norwood*, 1 *Harr. & Johns.* 128, the court was called on to say, that a tract of land, called *United Friendship*, which called to run to and with a tract of land, called *Yates his Forbearance*, *must* run to and *with* that tract, those courses of *United Friendship* that it called to run with. The Court, *Duvall* and *Done* judges, refused to give the direction. On appeal this decision was affirmed in the court of appeals by *Rumsey*, Ch. J. and *Mackall*, *Jones*, *Potts*, and *Dennis*, Judges.

The next case is *Tenant vs. Hambleton*, 3 *Harr. & Johns.* 233, where this court determined, that in locating a junior survey calling for an elder survey, that the elder must be run as it was in fact run at the time the junior survey was made. The tract called for contained calls, and therefore, if at the time the second survey was made it was run by its calls, they may govern, if not, then the courses and distances were to prevail. *Green vs. M'Clellan*, (*ante* 200.) was where a younger tract called to begin at the end of the *second line* of an older tract. *Baltimore* county court was called on to instruct the jury, that in fixing on the beginning of the last survey they were not bound to place it at the termination of the second line of the original tract, according to its original location, but at the spot where that was found to be when the second survey was made. The court gave, in conformity, as I apprehend, with the prior decisions, the direction prayed for.

At the time when the above mentioned survey was made, (whose place of beginning was the object sought for,) the variation of the needle was not so well known as to justify a surveyor, or a court, to run the location of a tract of land, containing only courses and distances, other

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wise than the needle pointed at the time of running—of course to call for the end of such a line, containing only course and distance, was the same as to say according as the needle then pointed "*et expressio eorum qui taciter insunt nihil operatur.*"

From the view I have taken of the decisions of the court of appeals, so far as the same has yet extended, it will appear that they have been uniformly consistent. To reconcile however all the decisions made by the general court on this subject seems to be rather a difficult task. And notwithstanding the great talents of those who presided in that court, when we consider that their memories were unaided with reports of their decisions, our surprise is not that some of them have been found to clash, but that so much consistency has been preserved. Nothing but the extensive learning which adorned that bench, could have prevented more discordant decisions. With these remarks, I come now to the review of two recent determinations of this court, on which reliance must be placed to reverse the judgment of the court below in the case before us. The first is *Carroll, et al. Lessee vs. Norwood*, determined at December term 1812, (*5 Harr. & Johns.* 163.)

It will be perceived, that this decision was made nine years after the judgment of the court of appeals, in the case of *Ridgely and wife, vs. Norwood*, which was founded on the same certificate, and one year after the case of *Tenant vs. Hambleton* was adjudged. And to take away from the judgment in the case of *Carroll vs. Norwood*, its binding authority, it may be remarked, that it was bottomed on the case of *Thompson vs. Brown*, which had been decided by the general court in 1803, and that too at a time when that case had five years before been reversed by this court. The case then of *Carroll vs. Norwood*, was made to rest on a decision which had been overruled when *Carroll and Norwood* was determined.

In the last mentioned case the court below were called on to instruct the jury, that a tract of land called *United Friendship*, which called to run to and with a tract called *Yates his Forbearance*, several courses, when said last tract had no such courses as those called for, must, without regard to the courses of the latter certificate, expend the number of perches said to run with *Yates his Forbearance*, on the lines of that tract. This direction the court refused to give, and on an appeal, their judgment was reversed; and as it appears to me in hostility to the principles, which the court of appeals had themselves previously established. But it is alleged that the decision by the general court in the case of *Howard vs. Moale, et al. Lessee*, which was in 1808, affirmed by this court, *2 Harr. & Johns.* 249, was inconsistent with the judgment of the court below in the present case.

On an examination of the case of *Howard and Moale* it will be found, I think, not to interfere in the slightest degree with the case under consideration.

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In that case the question was, in what manner the two first lines of a tract of land called *David's Fancy* (an escheat grant) should be located. *David's Fancy*, the original tract on which the escheat issued, is described "as beginning at a bounded locust tree being the north east bounded tree of *David Poole's* land called "*Upton Court*, and running by the land of said *Poole*, east 65 ps. to a *bounded oak*, then N E 150 ps. to a bounded oak of said *Poole's* land." *David's Fancy*, the escheat, calls to begin "at a *locust* now bounded at or very near the place where stood a bounded locust, the original beginning tree of a tract of land called *Upton Court* formerly laid out for *David Poole*, and running thence with the land east 65 ps. (it being expressed in the certificate of the original survey to run by the land of the said *Poole* E 65 ps. to a bounded oak which cannot be found) thence N E 238 ps. still bounding on the said land to the N W branch of *Patapsco* river, it being therein expressed to run N E 150 ps. to a bounded red oak of said *Poole's* land, and the certificate of the said *Poole's* land mentioning to run that course to a bounded red oak standing by the side of the said N W branch, which oak is not known."

The general court determined that if *David's Fancy* is rightfully located on the plots, at the termination of the 12th line of *Upton Court*, and there is no evidence of the existence of any such tree as called for at the termination of the first line of *David's Fancy*, which would vary the same from the course and distance of the 13th line of *Upton Court*, that then the expressions in the escheat grant, do, by operation of law, bind the escheat grant to the true location of the original tract called *David's Fancy*, as to *the two first lines thereof*, so far as the jury find the second line of *David's Fancy* (the original,) did actually extend, and that the first and second lines of *David's Fancy*, do, by virtue of the expressions therein contained, bind the said lines on the 13th and 14th lines of *Upton Court*.

This decision amounts to nothing more than this, that where a junior survey calls to a tree as the beginning of another tract, and then to run with it to the 2d and 3d boundaries of the original tract, such junior survey must run to, and be governed by, the lines of the original tract, if the bounds of such original tract are known, as they also are the bounds of the junior survey, but if they are not known the junior survey must then be governed by the legal location of the elder tract, as the same can be ascertained at the trial of the cause.

What application then has that decision, to prove that a junior survey calling to run with the lines of an elder survey must, in every instance, run to, and be governed by, such survey, even when such survey contains expressions which cannot be gratified, if its location is made to correspond with that of the original tract, or rather expressions directly inconsistent with such corresponding location.

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Is it not manifest, that when the junior tract called for the boundary of an elder tract, and to run with that tract to another boundary, that at the time when the junior survey was made, the location of the elder tract was known, and was run with it.

If then, by lapse of time, the bounds of the one are lost, so must also be the bounds of the other, and as they would have run together if the bounds were known, so must they run together course and distance, when the bounds are lost.

The next case relied on is *Rench vs Beltzhoover*, 3 *Harr. & Johns.* 469. In that case four bills of exceptions were taken to the opinion of the court below, which opinion, upon two of them, was reversed, and upon two affirmed. The court below determined that where one *tract called for another* the tract called for could only be ascertained by its patent name. In that case the defendant offered in evidence the grant of a tract of land called *The Resurvey on Dawson's Strife*, the twenty first line of which was N 72° W 170 ps. to the end of 226 ps on the second line of a tract called *Long Meadow*, and running with said land W 358 ps. The 2d line of *Long Meadow*, (the tract called for,) had only 140 ps. but another tract called *Long Meadow Enlarged*, had a line with 226 ps. The plaintiff then offered to prove that by reputation *Long Meadow Enlarged* had acquired the name of *Long Meadow*; this proof the court below rejected, and that opinion was reversed.

In the third bill of exceptions the court instructed the jury, that if they found that there were not 226 ps. on the second line of *Long Meadow*, as called for in the grant of *The Resurvey on Dawson's Strife*, that then in law the call could not be gratified, and that they must run course and distance as to that line with or without variation.

In the *fourth* bill of exceptions the 21st line of *The Resurvey on Dawson's Strife* calls to terminate at the end of 226 ps. on the second line of a tract called *Long Meadow*, and the 22d line calling to run with said tract. The court were called on to direct the jury, that the 22d line must run with it although the line called for by the 21st course had not 226 ps. but only 140 ps. This instruction the court refused to give, they being of opinion that the 22d was a dependant location on the 21st line, and must commence where the 21st ends, and if the 21st line could not be gratified, that then the 22d must commence and run from where the 21st ended without regard to the call. These opinions were confirmed by this court.

It seems extraordinary that this case should be relied on as directly in point against the judgment of the court below in the one now under consideration. For when they are compared, I think it will be manifest, that so far from being an authority for the appellant, it is one for the appellee.

In the case now before the court, the tract of land called *Heath's Range*, calls to begin at a tree standing at the end of the N E line of *Painter's Rest*, and running with that

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tract W N W 435 ps. and then the next line with the last line of the tract called for.

If then the tree, (the beginning of *Heath's Range*) does not stand at the end of the N E line of *Painter's Rest*, then that part of the description cannot be gratified if there are not 435 ps. on the W N W line of *Painter's Rest*. From the tree, you cannot run the number of ps. with it; and as the next line is (according to the case of *Rench vs. Beltzhoover*,) made to run from the end of the 435 ps. line, it can never be made to run with the last line of *Painter's Rest*, no more than in the case produced, could the 22d line of *The Resurvey on Dawson's Strife* be made to run with *Long Meadow*; but the line following the W N W line of *Heath's Range* must commence from the end of the 435 ps. without any regard to the true legal location of the last line of *Painter's Rest*.

The next case that came before this court, was *M'Clellan and Green*, *(ante* 200.*)* And here also the judgment of the county court, pronounced in correspondence with the decisions of the court of appeals existing at the time the county court gave judgment, was reversed. The reversal, as I apprehend, was produced in a considerable degree, by the recent decision in the case of *Carroll vs. Norwood*. If there was no other reason to be urged against that determination, save only that such principles must for ever exclude the land intended to be or actually taken up, perhaps its authority ought to be small; but when it is remembered that it rests in a great degree on the judgment pronounced by the general court in *Thompson vs. Brown*, the reversal of which, I presume, was unknown to this court when the case of *Carroll vs. Norwood* was determined; when a former general court on the same identical certificate had given a different judgment, which was affirmed by the court of appeals, the decision as authority is shaken to its foundation.

The last case that has been brought to the attention of the court is that of *Pumphrey vs. Ashpaw*, *(ante* 368.) In this case land taken up when you were authorised to lay down grants of land different from the point of the needle, or in other words to allow for the variation of the compass, a tract is taken up, calling to run to the lines of another tract, as laid down with a specified variation, and with the tract certain lines with the same specific variation. *Anne Arundel* County Court determined, that notwithstanding the manner in which the old tract was specially described when the younger survey was made, yet that description must have no effect; that the jury must first ascertain the original location of the old tract, and the last must be governed by it.

In 1818 this judgment was reversed by this court, and by this reversal it would seem that the decision of this court in the case of *Green vs. M'Clellan*, is greatly weakened; for the only difference as appears to me is that

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in the case of *Pumphrey vs. Ashpaw*, the certificate *expresses* what was as clearly *implied* in *Green vs. M'Clellan*.

In forming opinions on the effect of grants having relation to prior surveys, we ought steadily to keep in mind that it is the *last* and not the *first* survey the construction of which is sought; it is the confounding them together in the minds of those whose province it is to expound them, that has caused, as I believe, a difference of opinion.

As to the general rules of construction, that you cannot, by matter extrinsic to the grant or record, *contradict* it, whether the extrinsic matter depends on other grants or records, upon the most authentic ancient charts or surveys, or on the most conclusive parol proof, is conceded; the difference of opinion arises in the application. If the ancient grant is the one to be expounded, then its exposition cannot be influenced by any of those circumstances mentioned; but we have not the survey of the *first* land under consideration, it is not the grant of *Painter's Rest* resurveyed, but of *Heath's Range*, a subsequent survey, that is now to be construed; and the construction to be applied to it can never, in the slightest degree, influence the construction of *Painter's Rest*.

The decision of this court in *Pumphrey vs. Ashpaw*, (which took place after all the arguments advanced in this case were heard, and the bearing of all the authorities on the subject duly considered,) in my opinion has established the correct principle, to wit, that the junior survey must be run as it was run when the land was taken up, if there are any *expressions* in the junior survey to permit such a location.

In that case the tract called for was taken up a great many years before the survey of the land, the certificate and grant for which were under consideration; but as that certificate described *the manner* in which the original was run, it was consistent with the second grant to give it that location, although in doing so the ancient survey would not be run as it was when taken up. The junior survey did not call for it, according to its *original* or *primitive* location, it called for it as run *when the junior tract* was taken up; with its first position the last tract had no connexion, and therefore, when the land comprehended in the last survey was the subject under consideration, so far from being *contradictory* to, it was perfectly consistent with its certificate to locate *the first* survey in the *manner described* by the last.

A similar course of reasoning, I should have supposed, ought to have produced a different judgment than was pronounced in the case of *Green vs. M'Clellan*. There the *place* sought for was the *beginning* of a tract of land called *M'Clellan's First Venture*, which did not call for any visible object, but described its place of beginning as being at *the end of the second line* of a tract called *Come by Chance*. At the time *M'Clellan's* survey was made, the *end of the second line* of *Come by Chance* could only have been as-

certained by running the actual courses and distances as described in the certificate. At that time if an ejectment had been brought for *Come by Chance*, the patent in support of the action could not have been read if the land had been laid down on the plots in the cause with any the least variation from the course and distance described. Nay, after *M'Clellan's First Venture* had been taken up, and before the law passed permitting an allowance to be made for the variation of the needle, had an action of ejectment been brought for that land, *its beginning* could only be ascertained by running the two first lines of *Come by Chance* as the needle then pointed. The certificate of *M'Clellan's* land does not describe its place of beginning to be at the end of the second line of the other tract, according to its *primitive* location; nor doth it describe it as then ascertained by running at the point of the needle; but as it could not have been run except in that manner, the beginning, I humbly apprehend, should have been ascertained by fixing on the spot where the second line then terminated.

The only remark to be urged against the correctness of the reasons already advanced is, that the defendant's survey must be run according to the original location of the elder tract, or otherwise the tract called for is made to have two positions or locations.

The objection seems to me to have been already substantially answered. But is there any thing inconsistent with the second grant, to locate it as actually run, when the grant contains no expressions inconsistent with such a location?

The subsequent survey does not declare that the land called for was run by its original legal location; and all surveys now, and all containing calls, and courses and distances, before the variation of the needle was admitted to exist, have two legal locations, and which shall prevail depends on the existence of facts at the time the survey is called in question. Where there are calls to natural visible objects, and they can be proved, the courses and distances must yield to them; where the calls cannot be proved, the courses and distances govern.

Now, if such must be the case when the extent of the land comprehended in the original grant was the question under the consideration of a court and jury, ought not the same principles to apply to a junior survey, calling for such elder survey, where the bounds of the elder survey were unknown at the time the second survey was made?

The same course of reasoning is applicable, in as strong a degree, to the cause now before the court.

Heath's Range calls to "*begin at an oak standing at the end of the N E line of Painter's Rest resurveyed, and to run with Painter's line W N W 435 ps.*" and then another course with *Painter's* last line. It will be observed, that no tree is called for in the certificate of *Painter's* land at the end of the N E line. When *Heath's Range* was run the tree called for as its beginning is also *describ-*

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ed as standing at the end of the N E line of the other land. If you make the place where the tree stands the end of the N E line, then there exists a W N W line 435 ps. of *Painter's* land, with which the W N W line of *Heath's Range* can run, and then the next line of *Heath's Range* will run with the last line of *Painter's* land. But if the tree is not at the beginning of the W N W line of *Painter's* land, but 180 ps. on it, then will *Heath's Range* extend 180 ps. beyond the W N W line of *Painter's Rest*, and of course the next line cannot run with the last line of that survey. The land therefore called *Painter's Rest Resurveyed*, as described in *Heath's Range*, is that tract terminating the N E line at the oak; is that tract running a W N W line 435 ps. from the oak—and its last line to the beginning, presenting corresponding lines with *Heath's* survey.

But we have seen, by the decision of this court in the case of *Pumphrey vs. Ashpaw*, that where the original survey called for is described, (in the certificate of the tract calling for it,) as running in a specified manner, in locating the junior tract the first survey must be laid down to identify the last land taken up as it was run at the time of the last survey; and therefore, as the certificate of *Heath's Range*, by calling for a tree standing at the end of the N E line of *Painter's* land, when no such tree is called for in that certificate, the court below did not err when they directed the jury, that if they should believe, from the evidence in the cause, that at the time *Heath's Range* was surveyed the W N W line of *Painter's Rest* run from the oak, and then the last line to the beginning, and that the two first lines of *Heath's Range* run accordingly with them, that then that was the legal location of the last mentioned tract.

Martin, J. I concur in the opinion that the judgment of the court below in this case be reversed.

Dorsey, J. The tract of land called *Heath's Range*, according to its certificate bearing date the 31st of August 1704, begins at a marked black oak standing at the end of the N E line of *Painter's Rest*, resurveyed for *Richard Painter* the 17th of December 1678, and running thence with *Painter's* line, W N W 435 perches, thence along and with *Painter's* last line, S 36° W 210 perches, to the head of the lands surveyed from the river side, then N W along and with the heads of said lands.

Painter's Rest, surveyed for *Richard Painter* on the 17th of December 1678, after running two courses, which are immaterial to the decision of the question before the court, begins for the third line at a marked red oak, the boundary of the second line, and runs from the said red oak by a line drawn N E 535 perches, and from the end of the N E line, by a line drawn W N W 435 perches, and from the end of the W N W line, with a straight line 730 perches, to the beginning.

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The question submitted to the court is this—Do the expressions in the certificate of *Heath's Range*, which call for the W N W and the home lines of *Painter's Rest*, imperatively bind *Heath's Range* with *Painter's Rest* on those two lines?

I deem it unnecessary to examine the authorities which have been cited by the counsel on either side, as many of them are contradictory, and few of them profess to give the reasons on which the decisions were made.

I hold it to be an unquestionable principle of law, that the exposition of deeds or grants is solely confided to the court, and that their construction must be made on the terms or expressions of the grant, and not on facts *aliunde*.

Every grant presents two considerations to the court, the thing or corpus intended to be conveyed, and the quality of the estate in the thing. The description of the subject of the grant, as well as the estate therein intended to be conveyed, is part of the grant. That the court alone can decide on the nature of the estate, will not be controverted; but as the court cannot decide on the quality of the estate until the certainty of the subject matter thereof is ascertained, it would seem to follow, that the description of the thing is to be judged of by the court, especially as both of them are parts of the same contract.

It is a maxim of our law, that the subject matter of the grant must be described by intelligible and apt terms, or the deed is void; and who declares the grant void? The court; but if the court were not the sole and exclusive judges of the description, they would usurp authority by exercising this jurisdiction.

When a line has course and distance, and a call, if both cannot be gratified, one or the other must yield, or the deed will be void for repugnancy; and therefore, the courts of this state have decided, that the call shall be gratified at the expense of the course and distance. Calls are of different kinds, as of a tree, a stone, or a tract of land, and it would be difficult to assign a reason why the two first should be imperative, and the last not so. The true position of the tract of land called for, is matter of as much certainty as a tree.

By calling for another tract of land, and running with it, the party, if we may judge from the certificate, (and we have no right to seek for his intention elsewhere,) certainly intended to bind his land with the elder survey, and if such was his intention apparent on the face of the grant, we are bound to gratify it. To submit this question of intention to the jury, to be decided on testimony *de hors* the grant, would be productive of great uncertainty and endless controversy.

I am therefore of opinion, that *Heath's Range* must begin at the end of the north east line of *Painter's Rest*, wherever the jury may find the same to be, and bind with *Painter's Rest* as expressed in the certificate, unless the boundary called for as the beginning of *Heath's Range* is

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proved, in that case *Heath's Range* must begin at the said boundary, (it being the object called for, and the expression standing at the end of the north east line, being matter of description;) and if such boundary does not stand in the W N W line, then a course must be shaped in the nearest direction to strike the said W N W line, and then the first and second lines of *Heath's Range* must bind on *Painter's Rest*, as expressed in the certificate. The judgment of the court below ought to be reversed.

JUDGMENT REVERSED.

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J E D made a promissory note, payable to W D, or order, who endorsed it to W M, or order, who endorsed it to E P, or order. J E D and W D entered into a deed of composition with their creditors, (among whom was E P,) by which J E D and W D, having conveyed all their estate to certain trustees, among whom was W M, were discharged from all debts and sums of money due or owing to the said creditors, with a proviso, "that the said release shall not operate in favour of, or be construed to release any person or persons who may be bound for the said J E D and W D, or either of them, or who may have endorsed any notes or note drawn or endorsed by the said J E D or W D, or either of them." Due and legal notice having been given of the non-payment of the above note, E P brought an action thereon against W M as one of the endorsers—*Held*, that the action could be sustained, and that the release did not discharge the defendant from his responsibility as endorsor.

APPEAL from *Baltimore* County Court. *Assumpsit* on a promissory note, by the endorsee, (the appellant,) against the last endorsor, (the appellee.) The declaration contained two counts, one on the note, and one for money lent and advanced. The facts as agreed upon were these: The action is brought upon a promissory note drawn on the 27th of April 1813, by *John E. Dorsey*, for $3000, payable 90 days after date to *Walter Dorsey*, or order, by him endorsed to the defendant or order, and by the defendant endorsed to the plaintiff or order. Across the face of the note was written in red ink, "This note, held by *Edward Pannell* at the time of signing the deed of trust from *Wm. H. Dorsey* and others, to *Henry Payson* and others, forms part of the lien of $64,500 to *W. M'Mechen*, mentioned in said deed. *John E. Dorsey.*"

All the signatures to the note were admitted. Due and legal notice of its nonpayment by the drawer was given to the several endorsors; and the plaintiff was the holder of the note at the time it became due. The above mentioned writing in red ink was made and signed by *John E. Dorsey*, and was so made and signed by him in pursuance and in execution of a power vested in him by the deed hereinafter mentioned. A deed of trust was executed by *William H. Dorsey*, and others, to *Henry Payson*, and others, on the 23d of June 1813, a copy of which was annexed, and admitted to be a true and correct copy, and that the signature and seal of *Edward Pannell*, the plaintiff, to the said deed, was his signature, and that he had duly executed the deed within the 50 days prescribed therein. No part of the sum specified in the note, and for the recovery of which this action was brought, had been paid or satisfied to the plaintiff. The question on this statement of facts was, whether or not the plaintiff was entitled to recover? The deed referred to was dated the 23d of June 1813, and was between *William H. Dorsey*, *John E. Dorsey* and *Walter Dorsey*, of the first part, *Robert Gilmor*, &c. of the second part, *Henry Payson*, *William M'Mechen*, &c. of the third part, "and the creditors of the said *William H. Dorsey*,

John E. Dorsey and *Walter Dorsey*, who shall sign and seal these presents within fifty days next ensuing the day of the date hereof, and also such other creditors of the said *William H. Dorsey* as are herein after specially provided for, (without their signing and sealing these presents,) of the fourth or other part." The deed then states, that sundry tracts of land, &c. therein after mentioned, had been mortgaged to *Robert Gilmor*, &c. That *William H. Dorsey*, &c. were indebted to sundry persons in divers sums of money, which they were incapable of discharging otherwise than in the manner therein after mentioned. That "in order to discharge the said several debts, they have proposed and agreed to convey, &c. unto the parties of the third part, and the survivors, &c. for the benefit of the parties thereto of the second part, and of such of the said parties of the third part as are creditors, and of the rest of the creditors of the said *William H. Dorsey*, &c. in the manner and under and subject to the powers, provisos and conditions, hereinafter expressed and declared, all and singular the real and personal estate hereinafter described or mentioned." The said *William H. Dorsey*, &c. pursuant to the said agreement, and in consideration of the said sums of money so due and owing from them, and in consideration of the sum of one dollar, &c. granted, &c. to *Henry Payson*, &c. sundry tracts of land, &c. To have and to hold the said lands, &c. unto the said *Henry Payson*, &c. and the survivors, &c. upon certain trusts, &c. That certain funds be applied, in the first place, to discharge the debt due to *Robert Gilmor*, &c. In the second place one half, &c. to be applied to the payment of $19,000 due and owing to *J. E. Dorsey* for borrowed money, and to extinguish the interest on $64,400, and any endorsements or engagements which shall be admitted by *John E. Dorsey* within 50 days, over and above that sum, being the admitted lien of the said *William M'Mechen* on the estate and property, &c. After stating sundry other things it proceeds as follows: "And such of the parties hereto of the third part, as are creditors, and all the parties hereto of the fourth part whose names are hereunto subscribed and seals affixed, do hereby respectively signify and declare their assent to the terms and conditions of this deed, and their approbation of the provisions hereby made for the satisfaction and discharge of their several and respective debts and claims, and in consideration thereof they do severally and respectively release, acquit, and by these presents for ever discharge, the said *William H. Dorsey*, *John E. Dorsey* and *Walter Dorsey*, their heirs, &c. and each and every of them, and from the payment of the debts and sums of money due or owing to them, the said creditors, from or by the said *William H. Dorsey*, *John E. Dorsey* and *Walter Dorsey*, jointly, or from or by any or either of them jointly or individually; and also from all other claims and demands whatever, from the beginning of the world to the date of these presents. Provided that the said release shall not operate

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in favour of, or be construed *to release any persons or person who may be bound for the said William H. Dorsey, John E. Dorsey* and *Walter Dorsey, or any or either of them, or who may have endorsed any notes or note drawn or endorsed by the said William H. Dorsey, John E. Dorsey* and *Walter Dorsey, or any or either of them.*" This deed was signed, sealed and acknowledged, by the *Dorseys* and *Gilmor*, and by all the parties named therein, and among others by the plaintiff. On these facts the county court gave judgment for the defendant, and the plaintiff appealed to this court.

The cause was argued before EARLE, JOHNSON, and MARTIN, J.

Winder and *Murray*, for the Appellant. The defence relied on by the defendant below was, that he and the plaintiff signed a deed of trust, by which the *Dorseys* were released, saving the responsibility of all other persons; and the question is, whether the defendant is discharged from his liability upon the note in a suit under this release of the plaintiff, notwithstanding the proviso in the deed? 1. Is it not peculiarly the province of the law of merchants, that those acts which would release as to ordinary contracts do not apply to promissory notes? 2. The release is such as would not discharge ordinary contracts. It is said in 5 *Bac. Ab.* tit. *Release*, (G) 702, "if two or more are jointly and severally bound in a bond, a release to one discharges the others; and in such case the joint remedy being gone, the several is so likewise." Cites *Ex parte Slater*, 6 *Ves.* 146. Here there was no proviso that the others should not be released. So "also, if two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it; this proviso is void." Cites *Everard vs. Herne*, *Litt. Rep.* 190, where the obligors were *jointly* bound. But the drawer and endorsor of a promissory note are not jointly bound, they are bound severally. When jointly and severally bound, will the release of one, with a proviso, release the other? To show that it would not, they cited *Shep. Touchs.* 126. 3 *Com. Dig.* tit. *Condition*, (D. 4) 93, (D. 7) 95, 96. *Roe vs. Galliers*, 2 *T. R.* 133. 2 *Blk. Com.* 186. *Hayling vs. Mullhall*, 2 *W. Blk. Rep.* 1235. *Smith vs. Knox*, 3 *Esp. Rep.* 47. *English vs. Darley*, *Ibid* 49. *Mallit vs. Thompson*, 5 *Esp. Rep.* 178. *Clark vs. Devlin*, 3 *Bos. & Pull.* 363. *Chitty on Bills*, 147, 181, 198, 172, 173, 218, 219, 229, 166 to 174, 212 to 214, 232, 215, 230. *Gould vs. Robson*, 8 *East*, 576. *Rogers vs. Stephens*, 2 *T. R.* 713. *Goodall vs. Dolley*, 1 *T. R.* 712. *Bull. N. P.* 276. *Harding vs. Crethorn*, 1 *Esp. Rep.* 58. *Bowley vs. Stoddard*, 7 *Johns. Rep.* 207. *Sargent v. Appleton*, 6 *Mass. Rep.* 85. *Call vs. Hagger, et al.* 8 *Mass. Rep.* 423. *Marriott vs. Hampton*, 2 *Esp. Rep.* 546. *Brown vs. M'Kennally*, 1 *Esp. Rep.* 279. 2 *Kaimes*, 121. *Chitty on*

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Bills 91, 86, 101, 118. *Ballingalls vs. Gloster*, 3 *East*, 481; and 5 *Bac. Ab.* tit. *Release*, 608.

Pinkney, for the Appellee. There are two questions in this case—1. Whether the release, notwithstanding the proviso, and the fact that the defendant is a party to the deed, is not a flat bar? 2. Whether it is consistent with the intent of the trust deed, that the plaintiff can resort to the endorsor? As to the legal effect of the release at common law he cited 5 *Bac. Ab.* tit. *Release*, (G) 702. 18 *Vin. Ab.* tit. *Release*, 852, and 5 *Bac. Ab.* tit. *Obligation*, 157, 166. 167. He also referred to *Williams vs. Hodgson*, 2 *Harr. & Johns.* 474. *M'Fadden vs. Parker*, 4 *Dall. Rep.* 275. *Claxton vs. Swift*, 2 *Show.* 481. *Everard vs Herne*, *Litt Rep.* 191. *Cooke vs. Jenner*, *Hob.* 66. *Parker vs Lawrence*, *Ibid* 70. *Norton's* case, *Cro. Eliz.* 80. 1 *Esp. Dig.* 416. *Chitty on Bills*, 272, 274. *M'Donald vs. Bovington*, 4 *T. R.* 825, and *Nadin vs. Battie*, 5 *East*, 147. If the holder of a bond or note gives time to the principal, the security is released; by time is understood an extension of credit, until the end of which time, the holder by some act of his own has restrained his power of bringing suit. The reason why a security is released is that his risk is thereby increased, the contract is altered, the time is to his detriment. If he consents to this credit he has no equity to be released. But if the holder extinguishes his claim against the principal, so that he can never again sue him, the security is released, although he may give his consent not to be released, because the original contract is at an end; as for instance payment by the principal, the security is released, even if it were covenanted to the contrary.

Johnson, J. delivered the opinion of the court. The present is an appeal from a judgment obtained by the appellee on a suit brought against him by the appellant, decided on a case stated. [After stating the facts he proceeded.]

On those facts the plaintiff ought and would have recovered a judgment. The defence relied on is that the plaintiff, the endorsee and holder of the note, released the drawer and the first endorsor, and thereby discharged the last endorsor.

In forming an opinion in this cause, the nature of the release in question, and the manner and terms on which it was obtained, demand particular attention. The drawer, and the first endorsor, finding themselves in embarrassed circumstances, unable to meet their engagements as they became due, propose to compound with their creditors; and on the 23d of June 1813, executed a deed of trust to certain trustees, of whom the defendant was one, of a large real and personal estate, to be by them applied towards the payment of their debts, in the order directed by the deed; thereby securing, or attempting to secure, to

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the defendant in this cause, the payment of the notes in question, on the terms, that such of their creditors as should come in and assent by becoming parties to the deed, should participate and have an interest in the property so conveyed. The deed itself contains a clause by which the drawer and the first endorsor are released, on the express terms that such release should not extend to any other person, but that such person should continue responsible as if the deed had not been executed. To those terms the plaintiff and defendant assented, and signed their names, and set their seals to the instrument.

It is on that release, so obtained, and on such express stipulations, that the defendant, against the express terms of the instrument itself, relies for his exoneration.

The first question which arises is, ought a release on principle so obtained, with the consent of all parties interested, specifying its extent and object, to be extended beyond the stipulated object?

The second is, will the law, against the express agreement of all the parties interested, enlarge the release so as to produce a result different from the express stipulations; in other words, to give to the last endorsor the benefit of the release *against his express agreement?*

The object of the deed of trust was to give to the creditors of the drawer and first endorsor all the benefit they could derive from the property so conveyed—as between them this arrangement was of considerable moment; without it the second endorsor would have had nothing to rely on, but the individual responsibility of the drawer and first endorsor—that individual responsibility he was willing to release, on the substitution of the property conveyed on the terms and on the conditions prescribed by the deed.

It may be asked, why must a release, to which all persons interested are parties, have an effect different from that they agreed on? Will it violate any well known rule of law, or is it inconsistent with any principle of justice or propriety? So far from the latter being the case, the reverse appears to follow; for as the original debtors were bound to pay the whole, and as they could not, but were willing to transfer, on terms acceptable to all interested, what they had, for the easement of those who were bound for them, the refusal of him then holding the obligation to accede to such terms, would present grounds of complaint; not such, it is true, as would exonerate those who were bound for them. But although it would not free them, yet it is evident such refusal, in its result, must draw more from the funds of the last endorsor than otherwise would have been the case. With the assent of the holder of the note, a part, if not the whole, might have been raised from the funds of the drawer and first endorsor. Those funds could not be obtained except on their discharge, that discharge the second endorsor was willing to assent to, remaining himself responsible. But, if such discharges can-

not be obtained without releasing the last endorsor also, then no accommodation for his benefit, requiring the assent of the holder, can ever be obtained.

The question then is, must the release of the drawer and first endorsor, by virtue of any fixed principle of law, release also the next endorsor, when he is a party to the instrument containing the release, expressly declaring such should not be the effect?

In a case of this description, when a person claims the benefit of a release against its terms, to which he has assented, it might be expected some decisions in support of the position would have been produced—none such has been cited.

The cases relied on are, that a release given to a joint obligor, or to *joint* and *several* obligors, will release the other, and that a release to one trespasser, will release the co-trespasser.

As to the case of the joint obligor released, discharging the other, the principle of the decision seems to be, that unless it extended to all, the person to whom the release was given could obtain no benefit by it; and therefore, that a release given to such an obligor, should extend to the co-obligor, although the release on its facts contained a proviso to the contrary.

The only case which has been produced of such a limited or restricted release is *Everard vs. Herne*, in *Littleton's Reports*, 190; but the counsel differ in opinion as to the real state of that case. The one supposes the bond to have been joint only, the other joint and several. The reason why it is conjectured to have been joint and several is that the suit was brought against one. There is nothing in the case from which it is to be inferred the bond was several as well as joint, except only that one was sued. Nor is it deemed of any importance whether joint, or joint and several. But supposing the case in *Littleton* to have been on a joint and several bond, yet it seems not to meet the case before the court; for nothing is disclosed by that case of the *assent* of the co-obligor to such release producing such an effect. It is presumed that the release in that case was on a joint bond, for if the bond was joint and several, the obligor might have sued one, omitting to sue him he wished to benefit—a release therefore was not necessary, unless it was intended, as between the obligors themselves, to change the co-responsibility, and cast the whole burthen on him, whom the obligor elected to remain liable. But the case in *Littleton* is the only authority cited with a restrictive release.

All the other cases of releases are where the releases are general, *importing satisfaction*; and the debt, once *satisfied*, whether joint, or joint and several, the demand of the obligee was at an end, and of course he could recover from no person—differing materially from a release shewing by itself the claim still existed—differing materially from a case, where, by the facts as agreed on by the parties,

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it is expressly admitted that *no part* of the *money* has been *paid* or *satisfied*.

The cases most apposite to the cause before the court are where the holder of a note, or bill, gives time, which would exonerate the drawer or endorsor; but which *fact of giving time* is deprived of that effect in consequence of the *assent* of the person who would have been bound, if such time had not been given. The *time given* is the ground of *discharge or exoneration*, the *assent deprives* the time so given of such an operation.

Therefore, without saying that a release to a person bound jointly and severally, with a proviso attempting to limits its effect, can operate to the discharge of the co-obligors not included in the release, the court are clearly of the opinion, that the release given in this case cannot discharge the defendant from his responsibility as endorsor of the note on which the suit is brought. The judgment of the court is therefore reversed.

JUDGMENT REVERSED.

JUNE.

COOMES, *et al.* vs. CLEMENTS.

F T C, by his will dated in 1817, bequeathed the whole of his personal estate away from his wife, but devised to her a part of his real estate, and died leaving no child or descendant. The wife renounced the will. *Held*, that she was entitled to one half of his personal estate, after the payment of his debts.

APPEAL from a decree of the Orphans Court of *Anne-Arundel* County. The case was this:—*Francis T. Clements*, (the husband of the appellee,) by his will dated in 1817, disposed of the whole of his estate, both real and personal. A part of the real estate he devised to his wife, but bequeathed no portion of his personal estate to her. She renounced the will, and by her petition to the orphans court, claimed one half of the personal estate, the testator having died leaving no child or descendant. The orphans court decreed in her favour. From that decree the appellants, claiming as legatees under the will, appealed to this court.

The cause was argued before CHASE, Ch. J. and JOHNSON, MARTIN, and DORSEY, J.

Winder, *Chapman* and *Marriott*, for the Appellants. They contended, 1. That by the common law of *England*, at the time of the colonization of *Maryland*, a man had a right to dispose of the whole of his personal estate, by will, to the exclusion of his wife, if he thought fit to do so. They cited *Register of Writs*, 142. 4 *Coke's Inst.* 32. *Somner on Gavelkind*, 91. 1 *Swinb.* 300. 4 *Reeves' Hist. E L.* 82. *Reeves' Dom. Rel.* 1, 37. 2 *Blk. Com.* 495. 3 *Bac. Ab.* tit. *Executors*, &c. (F) 53, 54, (E) 35, (H 3) 67, (I) 71.

2. That it was the common law of *England*, and not the customs of particular places, which our ancestors brought with them at the time of their emigration and co-

lonization; and which has been since used and practised under.

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3. That the common law, with respect to the right of the husband to deprive his wife of any share in his personal estate, by his will, has never been changed by any act of assembly, either of the province or of the state. They referred, among others, to the acts of 1699, *ch.* 14; 1704, *ch.* 20; and 1715, *ch.* 39.

4. That if originally the common law secured to the wife a portion of her husband's personal estate, that law was changed before the colonization of the province. 2 *Blk. Com.* 491.

Pinkney, *Taney*, *Magruder*, and *Stephen*, for the Appellee. They contended, 1. That a widow was entitled to a certain share of the personal estate, independent of the will of her husband—to what the law terms her reasonable part. Such was the common law at the time of the colonization of *Maryland*. They cited *Glanvil*, 51, 52, (in the reign of *Hen.* II.) *Magna Charta*, *ch.* 18, (9 *Hen.* III.) *Bracton*, 60, 61, (*Hen.* III.) *Fleta*, 123, 124, (*Edw.* I.) *Fitz. N. B.* 284, (*Hen* VIII.) *Finch*, 175, (*Car.* I.) 2 *Blk. Com.* 493, 516. 4 *Burn's E. L.* 323, 324, 326, 327; and *Griffith vs. Griffith's Ex'rs.* 4 *Harr. & M'Hen.* 101. The question, they insisted, was conclusively established in the last case. The *dictum* of Lord *Coke* is at war with the authorities on which he relies. *Sommer* is not authority. With respect to the cases referred to, which goes to show that the executor was entitled to the *residuum*, and if no executor, the administrator, will be of no aid to the appellants. *Residuum* of what? Of all that could pass by the will, after payment of debts and legacies. But the widow's part could not pass by the will; it was therefore no portion of that *residuum* to which the executor or administrator was entitled. 2 *Blk. Com.* 494. *Toller*, 79. This right of the widow, it has been contended, where it prevailed, was founded on special custom, but was at war with the common or general law of the realm. Now if this was the case, the authorities would tell us in what parts of the kingdom the common law prevailed. A special custom is an exception to the general rule, confined to some small portion of the kingdom. Here all the authorities cited on either side, show that this law, by whatever name you call it, general or special, prevailed in divers and very many parts of the kingdom, and none of them state a single county or place in which a different law prevailed. If it be founded on special custom, why should it have prevailed so extensively? If the common or general law was otherwise, why can none of us discover any part of the kingdom in which this common or general law existed as the law of the kingdom? In *Griffith vs. Griffith*, the widow's claim was founded on the common law. It was not pretended that she claimed under any act of assembly; and there is no reason why that decision should now be reversed.

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2. To show that the acts of assembly are a clear recognition of the common law, and the right of the widow to a portion of her husband's estate, independent of his will, they referred to the various acts of assembly in regard to the subject of widow's rights. That the strong analogy between the acts of 1704, *ch.* 20, and 1715, *ch.* 39, *s.* 4, 5, and the customs of *England*, proves that those acts were taken from and founded upon those customs. *Swinb.* 204 to 219. If the decision of the court in *Griffith vs. Griffith* was correct, or is not now to be disturbed, it necessarily follows that the appellee in this case is entitled to one half, there being no child. This has been the law of *Maryland* while a province, and since. It appears by the acts of 1704 and 1715, that a part of the common law was introduced. These acts stated that widows claimed not only what was left them by their husbands, but their shares under the law besides. This was the practice from the first settlement of the province until 1699, when the legislature said the widow must make her election, and should not take both. The widow had no right to make such a claim, unless the common law gave it to her. Her right was acknowledged by the legislature, and yet it had no foundation, unless it was a part of the common law. The legislature always admitted the widow's *right*; though there are acts of assembly, passed at different times, varying the *quantum of her interest*. Sometimes she is considered entitled to one half in addition to the provision made for her by her husband; sometimes is forbidden to claim both, and sometimes, instead of one half, she is to receive only one third. But her right was never denied or repealed; and there existed, at the death of Mr. *Clements*, no act of assembly to alter the *quantum* of his widow's interest, unless the act of 1798, *ch.* 101, can be shown to have that effect. This case is not within the letter or spirit of that act. It says, *(sub ch.* 13,*)* that every devise or bequest to the wife shall be construed to be intended in bar of her dower in lands, or share in the personal estate, unless it be otherwise expressed in the will, unless she renounce, and by renouncing she shall be entitled to one third of the personal estate, *and no more.* This embraces the single case of a bequest renounced by the widow. Here there was no bequest, and could be no renunciation. The subsequent clause of that *sub chapter*, proves that her right was not to be impaired except in the single case of *a renunciation* of a *valid* bequest.

The Judges delivered their opinions *seriatim*.

Chase, Ch. J. The common law of *England* is the common law of this state, excepting such changes as have been made by the acts of the legislature. The common law pervaded the whole realm of *England*, and was co-extensive with its limits. Some peculiar local customs prevailed within the realm in certain cities, places and districts, in derogation of the common law, and were considered as privileges appertaining to each city or district, and were of no validity elsewhere. The origin of these customs cannot be

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well ascertained, but were claimed and pertinaciously adhered to as the law of each respective city or district.

I consider it established by the decision in the case of *Griffith vs. Griffith's Ex'rs.* 4 *Harr. & M'Hen.* 101, that it was the common law of *England*, at the colonization of *Maryland*, or the grant of the charter to *Maryland*, and long antecedent to that time, that a widow was entitled to her reasonable part of the goods of her husband, his debts and funeral expenses having been first deducted; and that that reasonable part was one third, or one half, according to the predicament in which she stood at the time of the death of her husband; that this reasonable part was not subject to the dominion or control of her husband; that her right was paramount his power, and that he could not, by his will, deprive her of it.

Although the common law did undergo some change in *England*, by imperceptible degrees, as to the reasonable part of the children, yet the time and manner of such change cannot be defined with any precision, or in a satisfactory way. It is certain, beyond a doubt, that no change ever took place in the common law, as to the reasonable part of the widow, before the colonization of *Maryland*. The right of the widow stands on the immutable principles of justice, and has been repeatedly sanctioned by the various acts of the legislature, modifying the right at some times without making any essential alteration.

As soon as the marriage is solemnized, all the personal property of the wife, by operation of law, is vested absolutely in the husband, no longer subject to her control or disposition. She cannot dispose of any part by her will, not even to her child, friend, or dearest relation, without the assent of her husband. This is the fair, the good consideration on which the right of the wife is founded. She who, with a liberal hand, and generous heart, gives all, is well entitled, when her husband can enjoy it no longer, to a third or one half.

The several acts of assembly relating to the right of the wife to a part of the personal estate of her deceased husband, commencing with the act of 1699, down to the act of 1798, contain a clear, unequivocal, and explicit recognition of that principle of the common law, which allows to the wife a reasonable part of the personal estate of her deceased husband. The following deductions are plainly inferrable from those acts. If the deceased dies intestate, leaving a wife, and without a child, the widow shall have one half of the personal estate. If the deceased makes a will, and makes no bequest of any part of his personal estate to his wife, or an invalid or inoperative bequest to her, and dies, leaving a wife and no child, she shall have one half of the personal estate; because, as respects his wife, he dies intestate; and this is in accordance with the decision in the case of *Griffith vs. Griffith's executors*, and is the just and sound exposition of the act of 1798, which declares, that it is consonant to justice that a widow accepting or

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abiding by a devise, in lieu of her *legal right*, shall be considered as a purchaser with a fair consideration, if the devise proves invalid or inoperative. A purchaser of what? Her share or legal right, because that which was intended as an equivalent has proved to be of no value, and he dies intestate of his personal estate as to his wife. Her share, or legal right, depends on the predicament in which she stands at the time of the death of her husband, which will be one half, or one third; one half if he died leaving no child, and of that she is declared to be a purchaser with a fair consideration.

I am of opinion, that the decree of the orphans court ought to be affirmed.

Johnson, J. By the decision in the case of *Griffith vs. Griffith's Executors*, as reported in 4 *Harr & M'Hen.* 101, the common law of *England*, as it existed on the settlement of *Maryland*, was adjudged to give to the widow a portion of the personal estate, whether the husband did or did not leave a will.

The various acts of assembly passed in *Maryland* recognize the right of the widow; the extent of the interest in certain instances has been ascertained; and where a case presents itself, coming within those specified cases, the widow's interest must be governed by them.

The act of 1798, *ch.* 101, passed before the will in question was made, restricts the widow's interest, whether children or not, to one third in the cases to which the restriction applies. The case before the court does not come within the restricted exception mentioned in the act; and as the testator died without leaving children, or their representatives, I am of the opinion the decision of the orphans court, giving her one half, was correct.

Martin, J. concurred.

Dorsey, J. I consider the case of *Griffith vs. Griffith's Executors*, as establishing principles by which the controversy in this case must be settled. If the point had been *res nova*, I should have pondered before I decided that the common law of *England*, at the time of the settlement of *Maryland*, gave to a widow a part of the personal estate of her husband, in opposition to his will, but as that, and other points directly bearing on the question now before the court, have been settled in the case referred to, I must bow to its authority. I am therefore of opinion that the decree of the orphans court ought to be affirmed.

DECREE AFFIRMED.

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Appeal from *Baltimore* County Court. *Assumpsit* brought on the 17th of July 1809, by the plaintiff, (now appellee,) as surviving partner of *S. & J. Smith*, against the defendant, (the appellant.) The declaration contained counts for money had and received—for money laid out and expended, and on an *insimul computassent*. All these promises and accountings are stated to have been to and with *S. & J. Smith*, in the life-time of the said *J.* The defendant pleaded *non assumpsit*, *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*. General replication to each plea and issue.

In *assumpsit* by S S, as surviving partner of S and J S, the declaration stated the promises to be to S and J S, in the life-time of J S The act of limitations was pleaded, and to take the case out of that act, evidence was offered of a promise made to S S, after the death of J S. *Held*, that the evidence was sufficient to avoid the statute; and that there was no necessity to declare specially on the promise to the plaintiff, as surviving partner.

The case of a surviving partner is distinguishable from that of an executor or administrator. The right and remedy are united in him; the original promise made to him and his deceased copartner, still exists, and the right of action with the remedy survives to him. The acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar of the act of limitations. It does not create a new *assumpsit*, but is a saving of the remedy on the original promises.

An acknowledgment of the debt, an offer to come to a settlement, or to refer to arbitrators, will take a claim out of the act of limitations. Per *Johnson*, J.

Where the defendant had read in evidence a letter from the plaintiff to A G, referring to a memorandum which A G had sent to the plaintiff, such a memorandum may be read in evidence by the plaintiff for the purpose of explaining the letter.

1. At the trial the plaintiff gave in evidence, that he, together with *John Smith*, deceased, was the owner of two *American* ships called the *Sidney* and the *Pomona*, which in the year 1794 were detained in *France* by the *French* government several months; that for this detention, the *French* government, on the application of the defendant, made in the name and on the behalf of the plaintiff and his said partner, allowed to them the sum of 89,330 livres current money, of *France*, and ordered it to be included in a general balance of 156,105 livres 16 sous and 9 deniers, the residue being due to the defendant on other accounts; that for this general balance the said government caused to be issued and delivered to the defendant a transferrable certificate of debt in his own name, which he received and sold at a discount of 50 p c. and converted the proceeds to his own use. The defendant then read in evidence a letter from the plaintiff to *Albert Gallatin*, Secretary of the Treasury of the *United States*, dated *Baltimore*, June the 20th 1804: "In a letter I received from you some time past, you inclosed a note of claims substantiated by Cap. *Barney* in the *French Bureau*, and submitted to the *American* commissioners—the first item of which, to wit, ls. 156,105 16 9, you say is claimed in my name, and in the name of other shippers of flour under contract with *Fauchet*. I owe it to myself to state, that I have no claim whatever against the *French* nation on that account—that I have been fully paid for the contract alluded to—and further, that I never have authorised any person to claim for me. If recovered, I hereby disclaim every pretension whatever thereto." This letter had been furnished to the defendant by the plaintiff. The plaintiff thereupon, in order to explain the letter, by shewing what was the tenor of the note therein referred to, produced the following note or memorandum in his possession, and proved to be in the handwriting of *Albert Gallatin*, and offered to read it to the jury: "Extract from the list of *American* claims against the *French* government, supposed to be proved by the convention.

2d year, Fructidor, No. 40, *Joshua Barney*—Flour delivered at *Bordeaux*, 156,105 16 9

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Decree of the 29th Germenal 16 year,			
5 year, Floreal 115. *Joshua Barney* for *Bentalou*, balance of supplies at *Cape Francois*,		695,550	10
Do. do. do. balance of a bill from *St. Domingo*,		15,392	
6 year, Germenal. The *Bungtall*, *Joshua Barney*, freight of a ship,		31,560	
	Ls.	898,608	6 9."

But the defendant objected to the reading of this note for the purpose for which it was offered. This objection the Court, [*Nicholson*, Ch. J.] overruled, and permitted the note to be read. The defendant excepted.

2. The plaintiff then offered in evidence an award and settlement, made by the proper officers of the *French* government, whereby was awarded to the defendant, as agent of the plaintiff and *J. Smith*, for demurrage due by the *French Republic* to them on the ship *Pomona*, the sum of 21,850 livres, and the sum of 16,800 livres for demurrage on the ship *Sidney*. He also proved that *Paul Bentalou*, as agent of the defendant, on the 9th of April 1803, sold the said two claims against the *French* government to *Robert Fulton*, at a discount of 50 per cent. and received the amount of the purchase. He further read in evidence a letter from himself to the defendant, and the defendant's answer to the same, the first dated *Washington* the 19th of February 1805, viz. "On examining a list furnished by the commissioners at *Paris* to the department of state, I find that an account in your favour, originating in the year 2 of the *French* Republic, had passed the board, and was then before the minister of *France* for his decision, before which was known it was deemed improper to carry out the amount. On further inquiry I am informed that one item of that account is for arbitrage for detention of ships which brought the flour, 14,930 bbls. alluded to in a previous item, at 89,430 livres. The account is dated *Paris an.* 10, and signed by you. I presume the bills will soon begin to arrive from *France* for such claims; I will therefore be obliged by your forwarding to me a statement of the proportion due to the *Pomona* and *Sidney*, which ships have been employed in carrying that flour, for their detention, so that I may know the precise amount due to *S. & J. Smith*. I observe that an interest of 6 per cent will be paid thereon from the 8th Fructidor, *an.* 4. Your answer will greatly oblige yours," &c. The answer, dated *Baltimore*, the 21st of February 1805, is as follows, viz. "You wrote on the 29th of November 1803, on the same subject as your letter of 19th inst. In my answer to your first I gave you every information I had, which answer you sent forward to your friends at *Paris*, of course must have received a further statement from them. In answer to your last I have to inform you, that I have never received any information from my friends

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in *Paris*, that any claim of mine had passed the *American* board, but on the contrary, that my claims had been rejected by them, and I suppose from the information of some zealous partizans in this country to the executive, who said my claim had been paid, and was unfounded, &c. If any claim of mine has been allowed as due in the year two, no doubt it has been sold previous to the treaty of 1803, as I gave such orders, and which I mentioned to you in mine, in answer to your letter of the 29th November 1803. But, Sir, I had no claim for 89,430, it was for 156,105 16 9, which sum was mentioned to the executive by the commissioners, as will fully appear by your letter to the secretary of the treasury, dated the 20th January 1804, (a copy of which I have, and to which I now refer,) that letter also explains what claims you can have on the above sum, if ever received by me. Whenever I receive a full statement from my friend in *Paris*, I shall not hesitate to communicate it to any person concerned." The defendant thereupon proved, that the *French* liquidation in the month of January 1806, upon a revision of the said claims confirmed the same, and that they could not be paid until they had been confirmed by the *French* liquidators. And he further proved, that the said *John Smith* died in the month of June 1805. The plaintiff then offered evidence to prove, that when he wrote the before mentioned letter to *Albert Gallatin*, he was wholly ignorant that any claim for the demurrage aforesaid, or any part thereof, was included in the said sum of 156,105 livres 16 sous and 9 deniers, mentioned in the aforesaid note. The plaintiff also, to prove that within three years next before the time of bringing this action the defendant made a new promise to pay the money so by him received to the use of the plaintiff, gave in evidence by a competent witness, that in the month of June 1809, there was a suit depending between the defendant, and one *John Hollins*, in the court of chancery of this state, in which *Hollins* claimed from the defendant, among other things a certain sum for the demurrage of the ship *Adeline* and brig *Moggy*, which had been allowed by the *French* government, at the same time and in the same manner with the allowance for demurrage on the *Pomona* and *Sidney*, and was alleged by *Hollins* to have been received by the defendant at the same time, and in the same manner, with demurrage on the *Sidney* and *Pomona*; that in the said suit in chancery the plaintiff was examined as a witness for *Hollins*, under a commission from the court of chancery, to prove the receipt by the defendant of the said demurrage on the *Adeline* and *Moggy*. That the defendant being present at that examination in the month of June 1809, the plaintiff said to him, I suppose you have concluded that I have given up my claim against you, meaning as the witness then and ever since believed, the claim of the plaintiff and *John Smith* for the aforesaid demurrage on the *Sidney* and *Pomona*. To which question the defendant, without in any manner denying the debt, or refusing to pay it, replied No.

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I suppose you are waiting the result of the suit between Mr. *Hollins* and me, meaning, as the witness understood and believes, the claim of *Hollins* for the demurrage of the *Moggy* and *Adeline* aforesaid; and also referring, as the witness understood and believes, to the question depending between the defendant and *Hollins*, whether *Hollins* should recover from the defendant the full sum allowed as aforesaid for demurrage, or the sum only which the defendant had received from the sale. Whereupon the plaintiff then said to the defendant, "If you would meet me, there could be no difficulty in settling on amicable terms." To which the defendant replied, "No, I have had enough of arbitrations, and now I want equity." And also for the purpose last aforesaid, the plaintiff produced and read in evidence, by the consent of the defendant, the following letters to him from the plaintiff, concerning the said demurrage for the *Sidney* and *Pomona*, dated the 25th of January 1809. "In March I mean to make a final settlement of the affairs of *Saml. & John Smith*. I will thank you for your account of demurrage of their ships due by the government of *France*, and which you mentioned to me in the court house had been settled, and must be paid for. I am informed of the amount paid to your order under the *Louisiana* cession, but I have no account of the charges you may have paid thereon, nor of the commissions you are entitled to for your compensation." And also read in evidence, for the same purpose, the following letter from the defendant to the plaintiff, in answer to the foregoing one, dated the 27th of January 1809: "I have received your letter of the 25th instant. In answer refer you to the letter of the 20th June 1804, to Mr. *Gallatin*, Sec'ry. of the Treasury, for any claim you have against me under the *Louisiana* treaty of cession." And also, for the same purpose gave in evidence, that in the month of March or April 1807, during a trial between the defendant and the said *Hollins* in *Baltimore* County Court, in which *Hollins* claimed from the defendant, by way of set-off, the full amount of the sum allowed by the *French* government for demurrage on the *Adeline* and *Moggy* as aforesaid, the defendant did acknowledge and admit that he had received the aforesaid liquidated certificate for the sum allowed as aforesaid for demurrage, including the allowance as aforesaid for the said *Sidney* and *Pomona*, and had sold the said certificate at a discount of fifty per cent. as above set forth, and had received the purchase money, and that the parties respectively entitled to the said demurrage had a right to receive from him their respective proportions of what he had actually received, but alleged that it was hard for *Hollins* to exact from him the defendant the full nominal amount of the said certificate. The defendant then moved the court to direct the jury, that upon the whole of the evidence, if they believed the same, the plaintiff was not entitled to recover. Which direction the court refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before CHASE, Ch. J. and JOHNSON, and MARTIN, J.

Williams, for the Appellant. This suit is brought for money alleged to have been received by the defendant, of the *French* government, for the use of the plaintiff and *John Smith*, in the year 1803. It is stated in the record, that it was proved *John Smith* died in June 1805. The plaintiff, as the surviving partner, to avoid the plea of limitations, relied on an acknowledgment made by the defendant to him in the month of June 1809; and on another acknowledgment made by him to the plaintiff in the month of March or June 1807. It was contended, on the part of the defendant, in the county court, that these acknowledgments were not sufficient to defeat or prevent the operation of the plea of limitation; but that court decided otherwise. It is not meant to be contended here, that the acknowledgments of the defendant, as proved, might not have been sufficient, under a different form of declaration, and with other counts, to prevent the operation of the statute of limitations; but it is insisted that they were not sufficient to produce that effect in the present suit, and framed as is this declaration. The assumptions in the declaration are stated to have been made to *Samuel & John Smith*, in the life-time of *John*, and the suit is brought by *Samuel Smith* as surviving partner. The plaintiff, in order to let in the acknowledgment of the defendant before stated, ought to have adapted his counts to the nature of his proofs. This doctrine is incontrovertibly shewn, and clearly illustrated, by the law in relation to acknowledgments made by or to an executor or administrator, *as such*, and assignees of bankrupts or insolvents, *as such*. If a plaintiff declares on promises made by the intestate, and the defendant as administrator pleads the statute of limitations on which issue is joined, a promise made by the defendant as administrator will not be competent evidence to resist the limitation, but the plaintiff should have declared on an *insimul computasset* with the defendant as administrator; that is, he should have declared that he accounted with the defendant as administrator of and concerning a debt due from the intestate to the plaintiff, and upon that accounting the defendant as administrator was found indebted to the plaintiff, and being so found in arrear the defendant as administrator promised to pay. So if the administrator is plaintiff, and declares on promises made to the intestate, and the defendant pleads limitations, a promise or acknowledgment by the defendant to the administrator within 3 years, will not take the case out of the statute; but the plaintiff ought to have declared that the defendant accounted with the plaintiff as administrator of and concerning a debt due from the defendant to the intestate, and upon that accounting the defendant was found indebted, and being so found indebted promised to pay the plaintiff as administrator. Or in the foregoing instances the declaration may run (in the first case put,) that the intes-

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tate being indebted, the defendant as administrator promised to pay, or (in the second case put.) that the defendant being indebted to the intestate, promised to pay to the plaintiff *as administrator*. So here by analogy it should have been declared that the defendant accounted with the plaintiff, surviving partner of *John Smith*, of and concerning a debt due from the defendant to *Samuel* and *John Smith*, in the life-time of *John*, and being on that accounting found so indebted, he promised to pay to the plaintiff, surviving partner as aforesaid; or, that the defendant having received money for the use of the said *Samuel* and *John Smith*, in the life-time of *John*, promised to pay to the said *Samuel Smith*, surviving partner of *John*, since the death of *John*. It will be observed that *John Smith* having died in June 1805, and the suit having been instituted in July 1809, no promise or acknowledgment made by the defendant to *Samuel* and *John Smith*, in the life-time of *John*, could possibly have been made *within three years* of the institution of the suit, and the declaration is obliged to assert what was impossible *in fact*, so as to appear to take the case out of the statute of limitations, that the promises were made in August 1806 to *Samuel* and *John Smith*, although *John Smith* had at that date been dead 14 months. There are many authorities, which establish these positions. In 2 *Saund.* 63, d, *(note* 6.) it is laid down, (that which is a consequence of the position contended for,) that if the assignee of a bankrupt declare that the defendant was indebted to the bankrupt, and *promised the plaintiff, the assignee*, to pay him, the plea of the statute of limitations, that the action *did not accrue to the bankrupt* within 6 years, is no answer to the declaration, which states that the promises were made *to the plaintiff* assignee; and if it were a good plea *it would preclude the plaintiff from giving evidence of such promise*. So where a similar action was brought by the assignees of an insolvent debtor, for a debt due to the insolvent upon promises to pay the *plaintiffs, as assignees*, a plea of the statute, that the action did not accrue *to the insolvent*, is no answer to the declaration. This note refers to *Kinder vs. Paris*, 2 *H. Blk. Rep.* 561. In the same note to *Saunders*, 63 (f.) the law is laid down in a manner more precisely applicable to this case. It states, if in *assumpsit* by an executor all the promises are laid to be made *to the testator* in his life-time, the defendant pleads he did not promise within 6 years, and the plaintiff replies that the letters testamentary were sued out within 6 years of the institution of the suit, so that 6 years had not elapsed when the action accrued *to the plaintiff as executor*, *the replication* is bad; because *the statute run from the time the action accrued to the testator*. So where in *assumpsit* by an executor, on a contract made with the testator, all the promises in the declaration are laid to be made to the testator; and the defendant pleads the statute of limitation, the *plaintiff cannot in his replication set*

forth a promise made to himself, without being guilty of a departure, any more than he can in such case give evidence of a promise made to himself within 6 *years, upon an issue joined on the plea of the statute of limitations. Saunders* refers to a long list of authorities of the highest character, and an intimation in *Heylin vs. Hastins, Carthew*, 471, to the contrary, which is asserted *not to be law.* So where to a declaration in *assumpsit* by the assignees of an insolvent debtor, for money due before his insolvency, stating all the promises to have been made *to the plaintiffs*, *the defendant* pleaded that he did not undertake and promise, in manner and form as the plaintiffs declared, he cannot *rejoin* that the cause of action first accrued *to the insolvent*, before the plaintiffs became assignees, and that 6 years had elapsed after the cause of action first accrued *to the insolvent*, for that rejoinder would be a plain departure from the plea. *Kinder vs. Paris*, 2 *H. Blk. Rep.* 562, *(note a).* Thus it will be seen by all these decisions, that it is necessary for the plaintiffs, who bring their suits in a representative character, to lay the promises and assumptions to be made to themselves, (where so much time has elapsed since the cause of action first accrued that the statute of limitations attaches,) if they rely on such promises or acknowledgments to take the cases out of the statute. Moreover, the authorities would never speak of promises and assumptions made *to the plaintiffs* who sue in a representative character, if they could maintain suits, and counteract the operation of the statute of limitations, by proving promises to have been made *to them in their representative character*, although the declaration should contain no other counts than upon promises made to the *original parties.* In 1 *Chitty's Plead.* 204, it is stated—"That an executor or administrator may declare *as such* for money paid in that character, and may join such count with counts on promises to the testator or intestate. So money had and received by the defendant to the use of the plaintiff as executor, on an account stated with him as executor of monies due and owing to the testator, or to the plaintiff as executor, may be joined with counts on promises to the testator or intestate." And "*where six years have elapsed since the death of the testator or intestate*, or it may on any other account *be material for the plaintiff to avail himself of a promise or acknowledgment since the death, counts should be introduced in the declaration on promises to the executor in that character, for otherwise, such promise or acknowledgment cannot be given in evidence.*" *Ibid* 204, 205, 343. *Sarell vs. Wine*, 3 *East*, 409. *Hickman vs. Walker*, *Willes* 29. In pursuance of these principles, maintained by incontrovertible authorities, *Chitty*, in his 2 *vol.* 46, gives the forms of the counts proper in such cases, with reference to the instance of a *surviving partner* who sues for a debt due to him in that right. Before introducing the counts on promises to the surviving partner, *Chitty* expresses himself in these remarkable words, shewing the appli-

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cation of the principles in cases of executors or administrators to cases of *surviving partners*. "If the debt be considerable, *or the deceased partner has been dead six years*, or it may on any other account be advisable for the plaintiff *to avail himself of a promise or acknowledgment to him since the death* of his partner, insert the counts," &c. and referring to *Sarell vs. Wine*, 3 *East*, 409. In *Hickman vs. Walker*, *Willes*, 29, the opinion of the court concludes in these words: "Because all the promises in the declaration are laid to be made to the testator, an executor *cannot give evidence of the promise to himself* within six years; and if he cannot, setting forth a promise to himself in his replication, as the executors have done in the present case, *is a departure in pleading*, and for that reason also the replication is not good." In *Secar vs. Atkinson*, 1 *H. Blk. Rep* 105, the court say, it is a common manner of declaring against executors and administrators, to save the statute of limitations, that *executors and administrators promised themselves* to pay, &c. In *Beard vs. Courman*, 3 *Harris & M'Henry*, 153, it was decided by the general court, that *evidence* that the executor had promised to the plaintiff executor, *would not support a declaration on promises to the testator*. The forms of counts on promises by executors and administrators in 1 *Harris's Ent.* 161, 162, 179, show the practice in this state. In *Tom vs. Goodrick*, 2 *Johns. Rep.* 213, it was held that the promise must be stated to have been made by the partner living at the time, alone; if stated to be by the deceased partner, and his survivors, it will be fatal. 3 *Chitty's Plead.* 19, 20, gives the forms of declarations against a surviving payee, and a surviving maker of a promissory note.

As the objections urged against the opinion of the court below in the *second* bill of exceptions, are considered to be fatal to the plaintiff's recovery, it is deemed wholly unnecessary to say any thing upon the *first* bill of exceptions.

Winder, for the Appellee. The *first* bill of exceptions seems to be abandoned by the appellant's counsel; but to the *second*, it was urged that proof was admitted which does not apply to the issue. It has been decided that it may be left to the jury to ascertain whether a promise had been made so as to take the case out of the act of limitations. 1. In this case there was sufficient proof to take the case out of the statute. It was not necessary that it should be an express promise. *Lloyd vs. Maund*, 2 *T. R.* 762. *Lawrence vs. Worrall*, *Peake's N. P.* 93. *Ball. on Lim.* 188, 190.

2. The principal question is, whether a promise or acknowledgment made since the death of one of two partners, can sustain a case where the promise is laid to have been made to both? No authority has been produced to show that an action like the present cannot be maintained. If it could not, there must be such cases in the books. The

practice of declarating on promises by executors, &c. seems to have been only applicable as to executors, administrators and assignees, of insolvents, and not to actions by surviving partners. Executors, &c. appear in a representative character, having nothing to do with the cause of action. But it is different as to a surviving partner, where the promise to him revives the original claim. The right of action is the same, and the surviving partner enforces the right, and he is not in the predicament of an executor, &c. who comes in by assignment, &c. or by transfer of law, as where a promissory note by endorsement is transferred, and the endorsee receives the legal right. Suppose an action on a promissory note endorsed by A to B, and the act of limitation is pleaded—an acknowledgment to A would enable B to recover. An acknowledgment by the party restores the right of action which was before taken away. No new consideration is necessary to take it out of the statute of limitations—a simple acknowledgment revives the original consideration, and restores the party to his original right. The statute does not extinguish the debt, but bars the remedy. *Ball. on Lim.* 188. In the case before the court the plaintiff was the original creditor, and the whole interest at law devolved on him. The acknowledgment relied on is, that the defendant received the money for the plaintiff and *J. Smith*, that admission removes the bar of the act of limitations. The cases cited by the counsel for the appellant, relates to executors, administrators and assignees, except *Tom vs Goodrick*, 2 *Johns. Rep.* 213, which was a case *against* a surviving partner, and to involve a person as a partner, his deceased partner must be alive at the time when the debt was created. It is incumbent on the counsel for the appellant to show that the cases of executors, administrators and assignees, apply to a surviving partner. The precedents in *Chitty* are no authority, and he only advises the change out of abundant caution.

Pinkney, in reply. There are two questions—1. The sufficiency of the acknowledgment without reference to the pleadings. 2. Its sufficiency in connexion with the pleadings. As to the *first*, the acknowledgment is not sufficient if the pleadings are correct. The statute of limitations is considered almost as a dead letter. The courts seem to interpret it so as to evade its operation. They have said that an acknowledgment will take the case out of the statute, and although it was not a new promise, yet it implied a new promise. The tide is now setting the other way. Courts are now more strict, and will not go further to evade the statute, and was the question to be decided now for the first time, a different rule would be established. 2. The acknowledgment is not sufficient under the pleadings. What was the issue on the plea of limitations? It was that the defendant did assume within three years, in manner and form as stated in the plaintiff's declaration,

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which was that he assumed to pay the plaintiff and *J. Smith*, in the life-time of *J Smith*. If it had been expressly proved that the defendant had promised to pay the plaintiff, would that be the promise as laid in the declaration, and as the plaintiff took it upon himself to prove? But no express promise is proved—there was simply an acknowledgment that a debt did exist. It was an implied promise, and the plaintiff was bound to prove that which he would be bound to prove if the promise, on which the cause of action is founded, was expressly proved. The plaintiff was not in a better situation than if the promise had been made more than three years. A promise to a dead man is of no effect. A promise to the plaintiff cannot by relation be a promise to *S.* and *J. Smith*; if it can, why cannot a promise to an executor by relation be a promise to the testator? Here the declaration counts on one promise, and the proof is as to a different promise. This will apply as well in the case of an executor as of a surviving partner. The surviving partner sues no more in his own right than an executor does. He comes in a representative character, although he has an interest. He does not claim to be entitled exclusively for himself, but as a surviving partner representing the firm. If he recovers, he recovers under an accountability in like manner as an executor. The representatives of the deceased partner may call on him and make him account. The predicament of a surviving partner, in the eye of reason, is identically the same with that of an executor. The doctrine of relation is wholly inadmissible, that the acknowledgment should relate to the original promise. Here a promise is laid as made to *S.* and *J. Smith*, which the defendant denies; but if made, it was not made to *S.* and *J. Smith*, within three years. The proof is that the defendant acknowledged the debt to *S. Smith*, and that when the acknowledgment was made *J. Smith* was dead. Is this maintaining the issue joined? The case cited are of executors, &c. and that where a promise is made to the executor, there must be a count on that promise to prevent limitation from barring. In *Green vs. Crane*, 2 *Ld. Raym.* 1101, the defendant *owned* the debt to the executor, and *promised him* to pay the debt which was due to the testator. There was no count on the promise to the executor; and on the plea of limitations, it was held that the promise was not within the issue, and could not be given in evidence. The case of an executor may be distinguished from that of a surviving partner in point of fact, but not in principle. They are both in representative characters; and if not in representative characters, they are not the persons to whom the promise was made. A promise made to one man is not a promise made to two. But it is said, that we have produced no case directly in point. It may be asked, why no case is produced showing that the decision has been otherwise? It may be answered, that ever since the question was settled as to executors, &c. the case of a surviving

partner has been considered as settled, and the forms, as to surviving partners, have been made to conform to those adopted in cases of executors, &c. Elementary writers are to be regarded, and *Chitty*, if alone, would be high authority; but without his authority the case is clear.

Chase, Ch. J. delivered the opinion of the court. The court are of opinion, that the act of limitations does not operate to extinguish the debt, but to bar the remedy. The act of limitations is predicated on the principle, that from length of time a presumption is created that the debt has been paid, and that the debtor is deprived of his proof by the death of his witnesses or the loss of receipts. It is the design of the act of limitations to protect and shield debtors in such a situation; and consistent with this principle, and this view, the decisions have been made, that the acknowledgment or admission of the debtor will take the case out of the act of limitations, because if the money is still due and owing, the defendant has not suffered from lapse of time, nor has any inconvenience resulted to him therefrom.

The case of a surviving partner is distinguishable from that of an executor. An express promise made to an executor creates an *assumpsit* to him, and is founded on the antecedent consideration of a debt due to the testator; and a count in the declaration must be framed on it, and the proof must correspond with and be adapted to it. The money, when recovered, will be assets in the hands of the executor, and he will be accountable for it. A surviving partner has a right to all the effects belonging to the partnership, and to receive, sue for and recover, all the debts due to the partnership. The right and remedy are united in him, the original promise made to him, and his deceased copartner, still exists, and the right of action with the remedy survived to him. The acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the act of limitations. It does not create a new *assumpsit*, but is a saving of the remedy on the original promise. The surviving partner is accountable to the creditors of the firm, and to the representatives of the deceased partner.

The court are of opinion, that the judgment of the court below be affirmed on both bills of exceptions.

Johnson, J. This was an action on the case for money had and received by the defendant below, (the appellant,) for the use of the plaintiff, in which the plaintiff recovered. The defendant pleaded the general issue, and the act of limitations, on which issues were joined. Two questions arise on the exception relied on. *First*, was the evidence sufficient to establish the claim on the general issue? On the argument this ground was not much relied on by the appellant; and on an examination of the proof produced by the plaintiff, the court are satisfied that it was fully adequate to sustain the plaintiff's claim on the general issue.

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The *second* question arising is, whether such declarations or admissions made by the defendant to *Samuel* and *John Smith*, within three years before a suit brought by them, would, if made to *Samuel* after the death of *John*, enable *Samuel*, the survivor, to recover the partnership debt?

The act of limitations was never intended to prevent the recovery of debts really due, but to protect persons from old claims when the evidence of their discharge, from length of time was supposed to have been lost.

The courts of justice in *England*, and in this state, considering, and correctly considering, such to have been the object of the statute, have availed themselves of any declarations or admissions on the part of debtors to remove the bar to the recovery presented by the act of limitations.

The decisions of the courts, on the offers and admissions of debtors, made within the time presented by the act of limitations, that the case was taken out of that act, do not go on the ground that a new cause of action was thereby created, or that a new promise was made to pay the old debt. A promise made within the period prescribed by the act of limitations, will authorise a recovery of the original debt, and in that instance, and in that alone, would the jury be justified in finding a verdict for the plaintiff on the issue joined on the act of limitations, if the position contended for on the part of the appellant was correct, that it is more a question of fact than of law; and that therefore a promise made to *Samuel Smith*, the surviving partner of *John Smith*, could not support the issue alleging such a promise to have been made to *Samuel* and *John Smith*.

If nothing but a promise to pay could revive a debt, or remove the act of limitations, then it would seem to follow that such promise must have been made to the plaintiffs themselves, and a promise to one partner, after the death of the other, would not support the issue on the part of the plaintiff when the act of limitations was pleaded. On the contrary, if a promise to pay is not indispensably necessary to support that issue, then may the plaintiff recover, although the fact of the promise to pay within the prescribed time is not made to appear to the jury.

It is most unquestionably established that an acknowledgment of the debt, an offer to come to a settlement, or to refer to arbitrators, will take the claim out of the act of limitations. Now an acknowledgment of the debt is not a promise to pay, nor is an offer to come to a settlement, or to refer the matter in contest to referrees, a promise to pay the claim, nor can they amount to more than this, and that by implication of law, to pay the sum ascertained to be due on the settlement, or the sum awarded. Yet all those acts will remove the bar presented by the act of limitations; for the admission of the debt removes all doubts as to its having been discharged, and the offer to come to a

settlement or reference, impliedly admits the party to be in possession of the evidence and documents necessary for such adjustments.

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But it is contended, on the part of the appellant, that before the surviving partner can recover on promises or admissions made to him, he must insert a special count relying on the promise made to himself; and it is contended, on the part of the appellant, that an executor could not recover a debt due to the deceased, relying for such recovery on a promise made to the executor to take it out of the act of limitations, without a special count on such promise, and therefore the surviving partner, before he can recover, must also specially declare on the promise made to him.

It appears to me that the decisions made in the case of executors must have been founded on a supposed necessity that the proof should correspond with the issue, to wit, the promise to the deceased. The case before the court is not that of an executor suing to recover a debt due to the testator, relying on a promise made to himself, without declaring on it, to avoid the act of limitations. We have seen, that the bar presented by the act of limitations may be removed without a new promise, and that any declarations made by the defendant, from which it is to be inferred that the demand is just, or that he is in possession of the documents to come to a settlement, are sufficient to remove the act of limitations; I am therefore of opinion that the admissions made in this case, although after the death of *John Smith*, were sufficient on the issue joined on the act of limitations.

JUDGMENT AFFIRMED.

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JUNE.

Where a case has been before the court of appeals upon a bill of exceptions, and a decision is made by that court on the law of the case, and a *procedendo* issued, and the court below gives judgment on the second trial in conformity to such decision of the court of appeals, if the same cause comes back to the court of appeals on an exception stating the same facts, whatever the court may think of their first opinion, the judgment must be affirmed.

APPEAL from *Prince-George's* County Court. *Ejectment* for a tract of land called *Mundell's Survey*. This case was formerly before this court on an appeal by the present appellee, and the judgment of the court below was reversed, and the record remitted under a *procedendo*, directing a new trial. [See 3 *Harr. & Johns.* 462.] The defendant (now appellant,) took defence on the plots returned, for all the land included in the plaintiff's pretensions, and which is included in the deed from *Ninian Beall* to *James Ranton*, dated the 15th of July 1706, as located by the defendant.

1. At the new trial the plaintiff, (now appellee,) read in evidence a patent of the tract called *Mundell's Survey*, granted to the lessor of the plaintiff on the 21st of October

The jury are to respect the instructions of the court on points of law in a civil action, and to find their verdict according to such instructions.

How far certain facts and circumstances were sufficient to lay a foundation to have justified the court in directing the jury to presume a grant of the land in dispute? *Quere.*

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1803; and also a patent for a tract called *Beall's Reserve*, granted in 1695, to *Mordecai Moore*, on a survey made for *Ninian Beall*, on the 25th of July 1684, and by him assigned to *Moore*. The survey is stated to have been made for *Beall* in pursuance of a warrant granted to him on the 15th of February 1683, for 1500 acres, and the land surveyed, and for which the grant issued, is described as "all that tract or parcel of land called *Beall's Reserve*, lying in *Calvert* county, on the west side of *Patuxent* river, and in the freshes of the said river, and on the east side of a branch called *Collington*, and on the west side of *Edward Isaac's* land, beginning at a bounded poplar of the land of the said *Isaac's*, thence," &c. containing 455 acres of land more or less. And he proved that these surveys were truly located by him on the plots. The defendant then read in evidence the following extracts from the land office of several warrants of survey having issued to *Ninian Beall*, viz. "1694, May 23d. Warrant for 3000 acres, dated the 18th of July 1689, granted *Ninian Beall* of *Calvert* county, this day renewed for the said quantity. 1694, December 20th. Warrant then granted to *Ninian Beall* for 1673 acres of land, due to him by renewment of that quantity out of a warrant for 3000 acres, granted him by renewment the 23d of May 1694. 1695, 7 bre. 21st. Warrant then granted to *Ninian Beall* for 400 acres of land, being due to him by renewal of part of a warrant for 1673 acres of land, granted him by renewment the 20th of December 1694." And to prove that *Beall's Reserve*, the land for which he took defence, was surveyed in virtue of the warrant granted to *Ninian Beall* for 1673 acres, and that the same had been patented to *Beall*, and that the jury might and ought to presume such patent to have issued, the defendant also offered in evidence the following entries from the *Rent Rolls* of *Prince George's* county, to wit. "400 acres. 16 yrly. val. *Beall's Reserve*, sur. 17 June 1695, for Col. *Nin. Beall*, beg. at a bounded oak of the land called *Forest*. Poss. Col. *Nin. Beall*. 400. 16. *Beall's Reserve*. Surveyed 17 of June 1695, for Col. *Ninian Beall*, beg. at a bound oak. Poss. 400. 16. *Richard Lee*, Esqr. 400. 16. *James Rantin* from *Ninian Beall*, 15 July, 1706." He also read in evidence a deed from *Ninian Beall* to *James Ranton*, dated the 15th of July 1706, with the endorsements thereon, conveying "all that tract or parcel of land called *Beall's Reserve*, being in *Prince George's* county on the west side of *Patuxent* river, in the woods and on the east side of the main branch of *Piscataway*, beginning at a bounded white oak being the S W bounded tree of a parcel of land surveyed for *Thomas Brooke*, called *The Forest*, thence," &c. containing 400 acres more or less; and a receipt dated 30th July 1706, for sixteen shillings sterling, being for alienation of the land. And that *Ranton* entered upon and became possessed and seized of the said tract of land as the law requires; and being so possessed and seized, that he did duly

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sign, seal and deliver, to a certain *Richard Lee*, a deed, which was duly acknowledged and recorded amongst the land records of *Prince George's* county, dated the 3d of August 1737, "for all that tract or parcel of land called *Beall's Reserve*, lying, situate and being, in *Prince George's* county, and adjoining to a parcel of land belonging to *Thomas Brookes* called *Potomac Forest*, containing 400 acres of land more or less;" and endorsed on the deed was a receipt dated the 4th of November, for sixteen shillings sterling paid for an alienation fine on the said land. And to prove that *Richard Lee*, and his heirs and representatives, were regularly charged by the Lord Proprietary with the quit rents on the land, as patented land held by him and them, and that he and they paid quit rents to the Lord Proprietor as for patented lands, he read in evidence extracts from the debt books for *Prince George's* county, whereby it appears that *Richard Lee* was charged with the said land on the debt books from the year 1753 to the year 1772 inclusive. And to prove that *Richard Lee*, and those claiming under him, had been in the actual seisin, possession, use and occupation, of the said land, claiming the same as their right, the defendant next offered in evidence, by competent witnesses, who were from 60 to 65 years of age, and who were born within a mile of the land, and grew up in the neighbourhood, and were acquainted with the land from their first remembrance, that as far back as their recollection extended, that part of *Beall's Reserve* claimed by the defendant, was used and cultivated by *Lee*, and his descendants, or by the tenants of *Lee*, and his descendants; and that no person, except *Lee* and his descendants, or his or their tenants, had to the knowledge or belief of the said witnesses possessed any part of the said tract of land, claiming the same as *Beall's Reserve*; but that a part of the land located by the defendant as *Beall's Reserve*, which was comprehended within the lines of the survey called *The Plains of Shrewsbury Resurveyed*, as located on the plots, had been in the possession and occupation of the owners of the last mentioned tract ever since that survey was made, or from about that time. It was further given in evidence, that *Lee*, at the time when the deed from *Ranton* was executed to him, and until his death, resided about 30 or 40 miles distant from the land; and that he being so seized and possessed of the land, died about the year 1790, intestate, leaving *Russell Lee* his heir at law, a minor, who entered upon and became seized and possessed of the land as the law directs; and being so seized and possessed, died before he arrived to 21 years of age, and without issue, leaving *Sarah Russell Contee*, *Ann Lee*, *Eleanor Dawson*, and *Margaret Clerklee*, the wife of *James Clerklee*, the defendant, his heirs at law; and that *Sarah Russell Contee*, *Ann Lee*, *Eleanor Dawson*, and *Margaret Clerklee*, after the death of *Russell Lee*, and before the institution of this suit, entered upon the said tract of land, and became seized and possessed

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thereof as the law requires. And to prove that *Richard Lee*, and those claiming under him, had been charged with and paid assessment for the land, the defendant offered in evidence the assessment lists of *Prince George's* county, in which were the following entries, to wit:

	value
"1781. *Lee, Richard.* Part of *Beall's Pasture*, 400 ac.	£400
1782. *Lee, Richard*, Esq. Part of *Beall's Pasture*, 400 a.	400
1783. *Lee, Richard*, Esq. Part of *Beall's Plains*, by Resurvey, &c. 400 a.	250
1786. *Lee, Richard.* Part of *Beall's Pleasure*, 400 a.	
1793. *Lee, Richard's* Heirs. *Beall's Reserve*, 400 a.	
1798. *Lee, Richard's* Heirs. *Beall's Reserve*, 400 a.	
1804. *Lee, Richard's* Heirs. *Beall's Reserve*, 400 a."	

And to prove that the land stated in the assessment lists, and the land mentioned in the said deed from *Beall* to *Ranton*, and referred to and mentioned in the rent rolls and debt books, was the same, the defendant offered in evidence that *Beall's Reserve*, as located by him, was situated in the hundred of *Prince George's* county called *Grubb Hundred*, from the assessment of lands in which hundred the said entries were taken, and that *Richard Lee*, and his heirs or representatives, had no land within that hundred, or in that county, called *Beall's Pasture*, or *Beall's Pleasure*, unless the tract called *Beall's Reserve* might have acquired that name by reputation. He also gave in evidence, that *Richard Lee*, and those claiming under him, had paid the quit rents and taxes on the whole of the tract called *Beall's Reserve*, and that the same, nor any part thereof, had not been assessed or charged to any other person, and that the whole tract was generally understood, and reputed by the neighbours to belong to the said *Richard Lee*, and his heirs, and to be called *Beall's Reserve*. He further offered in evidence certificates of adjoining surveys, to wit, *Potomak Landing*, surveyed for Col. *Henry Darnall* on the 5th of April 1685, containing 250 acres. *The Forest*, surveyed for *Thomas Brooke* on the 5th of September 1694, containing 547 acres. *Shrewsbury Plains*, surveyed for *Clement Hill* on the 2d of October 1719, containing 153 acres. *The Widow's Trouble*, resurveyed for *James Brooke* on the 15th of January 1732-33, containing 1848 acres. *Blacklock Venture*, resurveyed for *Thomas Blacklock* on the 15th of December 1755, containing 155 acres. *The Plains of Shrewsbury*, resurveyed for *Edward Clarkson* and wife, on the 25th of January 1772, containing 551¼ acres. And that those tracts of land, as also the tract called *Beall's Reserve*, claimed by the defendant, were by him truly located on the plots;

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and which plots, with the surveyor's illustration and explanation thereof, the defendant also gave in evidence. He also gave in evidence, that the record books in the land office had been searched and examined, and that no patent for *Beall's Reserve*, the tract for which he took defence, could be found, nor any certificate thereof recorded in that office, or was any to be found among the papers thereof. He also gave in evidence the deposition of *John Callahan*, now deceased, and who was formerly register of the land office, who deposed, that "previous to the year 1700, the register of the land office did not record, as it appeared by the old record books in his office, the payment made by the party of the composition money for lands surveyed for such party, or make any marginal note in the record of the certificate of such payment, whether the certificate was made upon a warrant of resurvey, or whether the certificate, when returned, included more land than was expressed upon the warrant or warrants upon which the same was made. That in the year 1679, and before and after as far down as the year 1700, there are many certificates for lands, surveyed for different persons, recorded in the land office, upon which it cannot be found that there is or are any patent or patents recorded in said office. That it is and always has been customary to recite in the patent or grant when issued, the consideration upon which the same issued, and the manner in which the composition money for the land mentioned in such grant was paid. That since the revolution several old patents, granted between the year 1678 and 1700, and one as far back as the year 1682, which were in the hands of those holding under the patentee therein named, and which had never before been recorded in the land office, have been produced to him to be recorded, and have been recorded. That it has sometimes happened to himself, since he has been in office, that the person for whom a patent was made out, took it to the governor to procure his signature, and having obtained it, never returned the *patent* to him to be recorded; whereby it happened that a patent in such case did regularly issue, and yet there was and is no record of it in his office. That for near 30 years last past he has from time to time frequently heard a report that one of the old record books in the Proprietary land office, containing the record of patents, has been lost. That the record books in the land office refer from one to the other, and that he never found a reference to any record book which is not to be found in the office, and that he from thence is of opinion no record book has been lost out of said office, burnt or destroyed." He also offered evidence, that *Beall's Reserve*, patented to *Mordecai Moore*, which was offered in evidence by the plaintiff, is a different tract of land from the tract claimed by the defendant, situate in a different part of the county, and owned and possessed by different persons. He also offered in evidence that there were two persons named *Ninian Beall* living in *Prince-George's* county, one the father, and the

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other the son; and that *Ninian Beall* the son, died in 1710, and *Ninian Beall* the father, in 1717; and that beside the tract for which the defendant took defence, surveys were made, and certificates returned, to the Proprietary land office, in the name of *Ninian Beall*, between the years 1680 and 1707, for 19,730 acres of land, situate in *Prince-George's* and *Calvert* counties, for which the caution money was paid; among which tracts were two, each called *The Inclosure*, the one for 1503 acres, surveyed for *Ninian Beall* on the 1st of March 1686–7, and the other for 237 acres, surveyed for *Ninian Beall* the 8th of December 1698. He further offered evidence, that *Beall's Reserve*, claimed by him, was the first survey made in the name of *Ninian Beall*, after the warrant for 1673 acres was granted him; and that there was at least a sufficient number of acres of that warrant, unappropriated to other surveys, to satisfy and pay the caution money on the survey of *Beall's Reserve*, the tract claimed in this cause by the defendant. He also read in evidence a number of original certificates, returned by the deputy surveyors of different counties, some on the *eastern* and some on the *western shore*, and some original warrants which had been issued from the Proprietor's land office, which original papers were found during the trial of the cause in the house of Doctor *William Hill*, near *Upper Marlborough*, among the papers which had been in the possession and care of his grandfather *Clement Hill*, formerly surveyor general of the *western shore*, one of which original papers was dated in the year 1680, another in 1698, a third in 1704–5, and a fourth in 1707—the others principally in the years 1713, '14 and '15. He further gave in evidence by Doctor *Hill*, that the *British* troops took possession of his house last summer twelve months, when all the books and papers there fell into their possession, and were scattered about the house and the yard; and that after the said troops had left the county, the papers remaining were collected together; but that it appeared a great proportion was missing, being either destroyed or carried off by the enemy. He further offered in evidence, that the *field books* of the different deputy surveyors who had surveyed lands granted in *Prince George's* county from the year 1684 to the year 1700, were formerly at the house of Doctor *Hill*, having been left there among the books and papers of *Clement Hill*; and that two of said field books are now in his possession, but not those which contain surveys made in 1695. But that the father of Doctor *Hill*, lent one of them formerly to the late *Stephen West*, which could not now be found, and that he, Doctor *Hill*, lent another of them some years past to *Arthur Shaaff*, esquire. He further offered in evidence, that *Ninian Beall* was in the year 1680 a deputy surveyor of *Calvert* county; and also offered in evidence the *Land-Holder's Assistant*, to prove to the jury that it was not the practice in the land office, at the time when the said survey which the defendant claims was made, to record the certificates, until patents were granted thereon. The plaintiff then prayed the

opinion of the court, and its instruction to the jury, that the evidence in this case is insufficient to justify the jury in presuming that a grant issued to *Ninian Beall* for *Beall's Reserve*. This instruction the Court, [*Key*, A. J.] gave. The defendant excepted.

2. The defendant then prayed the court to instruct the jury, that the entries on the rent rolls, stating that *Beall's Reserve* was surveyed for *Ninian Beall* on the 17th June, 1695, and that the possession of the said land was in *Ninian Beall*, could not possibly be accounted for by reason of the deed from *Ninian Beall* to *James Ranton*, nor deducible from that source; and therefore, that if the jury believed that the entry in the rent rolls, and the charges in the debt books were made by or under the direction of the Lord Proprietor's officers, entrusted by him with making out grants for his lands, and with collecting his revenue; and if they believed *Ninian Beall* was on the 17th of June 1695 in possession of the warrant for 1673 acres of land, which at that time was not, nor had been appropriated for payment for any other lands, and that so much of that warrant as was sufficient to satisfy the caution or composition money to the Proprietary for the lands included in the tract, for which the defendant took defence, had never been appropriated to any other survey or in payment for any other lands; and that *Ninian Beall*, and those claiming under him, had been in the undisturbed possession and enjoyment of said land, from the year 1695 until the plaintiff surveyed the same; and if they further believed that the said tract, and the other tracts located by the defendant, were truly located by him on the plots, that then they might find that *Ninian Beall* had an equitable interest in the land derived from the Lord Proprietor, either by a located warrant, and payment of the caution or composition money, or by a certificate of survey on a common or other warrant, and a payment of the composition, and a length of possession consequent on such equitable interest in *Beall*, and those claiming under him; and if from the whole of those facts and circumstances, the jury should be satisfied and believe, that a patent was issued for the lands to *Ninian Beall*, they might find a verdict for the defendant. This opinion the Court [*Key*, A. J.] declined to give. The defendant excepted, &c.

3. The plaintiff then prayed the court to direct the jury, that they ought to respect the instructions of this court, and the opinion of the court of appeals on which the same was founded, and that they ought to find their verdict as directed by the courts' instructions; and had no lawful right to disregard the same, and to find a verdict contrary thereto, the court being, according to our laws and constitution, the proper tribunal to decide questions of law. Which opinion the Court, [*Key*, A. J.] gave, and directed the jury accordingly. The defendant excepted. Verdict and judg-

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ment for the plaintiff, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and EARLE, MARTIN, and DORSEY, J.

Martin, (Attorney General,) for the Appellant, contended, that although the evidence on the former trial, in the opinion of this court, was not sufficient to found the presumption that a grant had issued to *Ninian Beall* for the land in question, yet that the additional evidence offered at the last trial was sufficient for that purpose; and the court below erred in not directing the jury, that if they believed the evidence, they ought to presume such a grant to have issued to *Ninian Beall* for the tract of land called *Beall's Reserve*. He referred to *Kilty's Land Hold. Ass.* 64, 65, 66, 108 to 112, 161, 162, (and *note*,) 163, 256, 257. To show under what circumstances deeds and grants of private persons, and grants of the King or of the Proprietary might be presumed, he cited *Keymer vs. Summers*, *Bull. N. P.* 74. *Stocks vs. Booth*, 1 *T. R.* 431. *(note a.) Griffith vs. Matthews*, 5 *T. R.* 296. *Campbell vs. Wilson*, 3 *East*, 294. *Bealy vs. Shaw*, 6 *East*, 215. *Eldridge vs. Knott*, *Cowp.* 214. *Denn vs. Barnard*, *Ibid* 597. *Jones vs. Turberville*, 2 *Ves. jr.* 13, 14. *Blewitt vs. Thomas*, *Ib.* 669. *Hillary vs. Waller*, 12 *Ves.* 250 to 266. *Earle vs. Baxter*, 2 *W. Blk. Rep.* 1228. *Gittings's Lessee vs. Hall*, 1 *Harr. & Johns.* 14. *Bradford's Lessee vs. M'Comas, et al.* 3 *Harr. & Johns.* 444. *Bergen vs. Bennett*, 1 *Caine's Cas.* 18. *Van Dyck vs. Van Bueren*, 1 *Johns. Rep.* 90. *The King vs. The Inhabitants of Long Bushby*, 7 *East*, 45. *Gray vs. Gardiner*, 3 *Mass. Rep.* 399. *Fassett's Lessee vs. Dale*, 3 *Harr. & Johns.* 119. *Brown vs. Frost*, 2 *Bay's Rep.* 126. 2 *Bac. Ab.* tit. *Evidence*, (H) 660. *Crimes vs. Smith*, 12 *Coke*, 4. *Beadle vs. Beard*, *Ib.* 5. *The Mayor of Kingston Upon Hull vs. Horner*, 1 *Cowp.* 106. *Halcroft vs. Heele*, 1 *Bos. & Pull.* 400. *Roe vs. Ireland*, 11 *East*, 283. *Parker's Lessee vs. Baldwin*, *Ib.* 488 to 490. *Lloyd vs. Gordon*, 2 *Harr. & M'Hen.* 254. *Greenhawk, et ux. Lessee, vs. Cumberford, (a). Carroll, et*

(a) This case, the attorney general stated, was an action of ejectment in the General Court for the *eastern shore* at April term 1792, before *S. Chase*, Ch. J. and *Goldsborough* and *J. T. Chase*, J. That at the trial the plaintiff offered in evidence a certificate for a tract of land called *Rigby*, the land in dispute, surveyed in 1679 for *John Woolers;* that *Woolers* in 1694, conveyed it to *J. Bradbury;* and that *Bradbury* in 1735 conveyed to *T. Hutchins*. He proved that *Hutchins* was in possession of the land, and died in the actual possession, leaving two sons, *Thomas* his heir, and *Alexander;* that *Thomas* enlisted in the army in the war of 1756, and never returned, but left an only daughter, who while a minor married *Greenhawk*, one of the lessors of the plaintiff. *A. Hutchins*, after his brother enlisted obtained a grant of the land in 1762. The defendant claimed under the grant to *A. Hutchins*. Upon applica-

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al. Lessee vs. Norwood, 4 *Harr. & M'Hen.* 287. S. C. 5 *Harr. & Johns.* 155. *Hall's Lessee vs. Gough*, 1 *Harr. & Johns.* 119. *Allston's Lessee vs. Saunders*, 1 *Bay's Rep.* 36. *Lucas vs. Owens*, *Ib. Index.* tit. *Nullum Tempus*. *Read vs. Brookman*, 3 *T. R.* 158, per *Buller*, J. and *Archer vs. Sadler*, 2 *Hen. & Munf.* 370.

Magruder, for the Appellee, insisted that the evidence offered at the last trial did not change the case so as to make the grounds and principles of the decision of this court on the former appeal, inapplicable. To show that the recital in the deed from *Ranton* to *Lee* was not evidence in this case, he referred to *Peake's Evid.* 73, and 1 *Phill. Evid.* 305. Upon the doctrine of presumption, and of an elder certificate of survey over-reaching and defeating an elder grant obtained on a junior certificate, he referred to *Hammond's Lessee vs. Norris*, 2 *Harr & Johns.* 130, and *Cockey's Lessee vs. Smith*, 3 *Harr. & Johns.* 20.

MARTIN, J. delivered the opinion of the court. In the case of *Hambleton vs. Tenant*, (*ante* 440,) this court decided, that where a case had been before them upon a bill of exceptions, and a decision made by this court on the law arising upon it, and a writ of *procedendo* issued, and the court below gave judgment on the second trial in conformity to the decision of this court, if the same cause came back to this court on a bill of exceptions similar to the first, the judgment should be affirmed; for the court below were bound by the decision of this court, and could not err in giving judgment in conformity to it. Upon the same principle, the court think the judgment in this case ought to be affirmed; for although some new testimony was offered in the second trial, it did not vary the case, or take it out of the rules of law upon which this court had decided it.

It is unnecessary to state what would be the opinion of this court upon this case, if it was now before them upon its merits.

JUDGMENT AFFIRMED.

tion to the court they directed the jury, that as Mrs. *Greenhawk* was the daughter of *T. Hutchings*, the son, and heir at law of *T. Hutchings*, the father, who died in possession of the land, and as she was entitled to the land, and to a grant, the jury might presume, notwithstanding the grant to her uncle *A. Hutchings*, that a grant had been antecedently issued to her, as in right it ought to have been. The jury accordingly did presume such grant, and found a verdict for the plaintiff. See 3 *Harr. & M'Hen.* 589.

G. Scott, for the Plaintiff.
Martin, (Attorney General) for the Defendant.

1819. JUNE.

DUKEHART'S EX'RS. vs. THE STATE use of JACOBS.

Dukehart vs The State

To disprove the plea of *plene administravit*, pleaded by an executor defendant, the plaintiff offered in evidence a lease duly executed to the testator for a lot of ground for 99 years, at annual rent—*Held*, that it might be read in evidence, although it had not been returned in the inventory to the Orphans' Court, and although no notice had been given to the defendant that it was intended to be offered in evidence, to show a fraud or want of truth in the inventory.

APPEAL from *Baltimore* County Court. Debt upon a guardian's bond, executed on the 5th of November 1803 to the state, by *William C. Cockran*, with *Thomas Dewet*, and the testator of the defendants, (now appellants,) as his sureties, conditioned that *Cockran*, as guardian of *Rachel*, *John*, *Sarah*, *Michael*, *Charlotte* and *Juliet Jacobs*, should faithfully account, &c. in the usual form. The defendants pleaded that *Cockran* paid to *John Jacobs*, (the person for whose use the action was brought,) after he attained the age of 21 years, to wit, on, &c. the whole sum of money which the said *J. Jacobs* was entitled to have and receive from the said *Cockran*, as guardian aforesaid, and did in all respects perform the duty of guardian to the said *J. Jacobs* according to law, &c. They also pleaded *plene administravit*. The replication to the first plea, protesting that *Cockran* did faithfully account, &c. in the words of the condition of the bond, assigned for breach that *J. Jacobs*, mentioned in the condition of the bond, before the impetration of the writ original in this cause, to wit, on, &c. attained the age of 21 years, and that upon a final settlement of the estate of the said *J. Jacobs*, at the time of his arrival at the age of 21 years, there was due to him from *Cockran*, as guardian of the said *J. Jacobs*, the sum of $600; nevertheless *Cockran*, although thereunto requested, had not paid and delivered over the said sum of, &c. to the said *J. Jacobs;* and so the said state saith, that *Cockran* had not performed the duty of guardian to the said *J. Jacobs*. All which, &c. General replication was replied to the second plea, and issue joined. To the replication to the first plea the defendants rejoined that *Cockran* did faithfully account, &c. in the words of the bond. And that upon a final settlement of the said estate, at the time of the arrival of the said *J. Jacobs* at the age of 21 years, the sum of $600 was not due to him by the said *Cockran*, nor was any part thereof due by *Cockran*, as guardian to the said *J. Jacobs*, in manner and form, &c. To this rejoinder there was the general surrejoinder and an issue. At the trial of the cause the defendants, in order to support the issue joined to the plea of *plene administravit*, offered in evidence the final settlement of their accounts with the orphans court of *Baltimore* county, showing, that as executors of their testator they had overpaid the estate $801 03. And also the order of the orphans court directing them as executors, &c. to give notice to the creditors of the deceased to exhibit their claims and debts. They further gave in evidence, that publication was made by them in the public newspapers in the city of *Baltimore*, in conformity with the said order; and that the whole of the assets, as returned by them to the orphans court, was duly paid and distributed among the creditors whose claims had been exhibited to them. And it did not appear from any evidence, that the defendants had any

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knowledge of the existence of the claim of *J. Jacobs*, or that the same had in any way been notified to them before the distribution of the assets as above mentioned. The plaintiff, in order to disprove the plea so pleaded by the defendants, offered in evidence a lease duly executed, acknowledged and recorded, from *P. Diffenderffer* to the defendants' testator, dated the 28th of December 1803, for a lot of ground in the city of *Baltimore*, and therein described, at the annual rent of $480 for 99 years renewable forever, with the usual clause of a right to re-enter on non-payment of the rent. But the defendants objected to the reading in evidence this lease for the purposes for which it was offered, as the same was not returned in the inventory exhibited by them to the orphans court of the personal estate of the testator, nor was there any notice given by the plaintiff that it was intended to introduce evidence to show fraud. or want of truth in the said inventory. This objection the Court, [*Bland*, A. J.] overruled, and permitted the lease to be read to the jury. The defendants excepted; and the verdict and judgment being for the plaintiff, they appealed to this court.

The cause was argued before CHASE, Ch. J. and EARLE, JOHNSON, and MARTIN, J.

Williams and *R. Johnson*, for the Appellants. 1. The lease not being returned in the inventory was not evidence. 2. Without other proof it was not evidence. They referred to the act of 1798, *ch.* 101, *sub ch.* 6, *s.* 6, 13, and *sub ch.* 8, *s.* 15. *Buckley vs. Firk*, 1 *Salk.* 72; and *Toller* 141.

Winder, for the Appellee.

JUDGMENT AFFIRMED.

BURT vs. GWINN.

JUNE.

APPEAL from *Baltimore* County Court. *Assumpsit* brought by the endorsee, (now appellant,) against the sur

Where a variety of contested facts were laid before the jury, and on consideration of its inception or negotiation, it is not for the court to advise them as to the conclusions they are to draw the one way or the other.

them they had to decide whether a promissory note had been tainted with usury in

It is sometimes the duty of the court to decide this law upon facts, but it is after they are well ascertained by admissions or otherwise, and not while they are unsettled between the parties.

If a note is drawn to borrow money at illegal interest, and the holder obtains money on it on a usurious consideration, the note is under any circumstances void But if the note is *bona fide* in its origin, an innocent holder without notice may recover on it, though it may have been subsequently passed upon a usurious consideration.

Whether a note drawn to borrow money is usurious and void in its inception, because money has been obtained on it by the holder on a usurious consideration, although the drawer, at the making the note, has no knowledge that such a use was to be made of it? *Quere.*

Although the declarations of a merchant's clerk made to a notary public in the course of business, may be used as evidence for some purposes, they cannot be so used to establish a fact not immediately connected with the solemnity of protesting.

Where a part of the testimony of a witness was "that the sum of $150 retained by W, *as he the witness understood and presumed*, was about the sum intended to be charged for discount upon the said note"—*Held*, that the expressions, "as he the witness understood and presumed," taken alone and unconnected by others used by him, imported his opinion, and were in themselves inadmissible evidence; but that as they could not be separated from the other part of the testimony without doing more mischief than the retaining them would do, they were admissible evidence

Held by *Baltimore* county court, that the payee of a promissory note is a competent witness, in an action on it by the holder against the maker, to prove that the plaintiff was the holder of the note, and had paid him the full value thereof before the note became due, and that the note was not deposited in the bank by him the witness, nor for his use, and that it was endorsed by him to the plaintiff by his writing his name upon it at the time of the delivery thereof by him to the plaintiff.

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viving drawer, (the appellee,) of a promissory note. The declaration contained the usual counts, and the general issue was pleaded.

1. At the trial the plaintiff gave in evidence the following promissory note:

"*Baltimore*, 6th March, 1813.

Dollars 4750. Sixty days after date we promise to pay to *John Wallis*, Junr. or order, negotiable at the Bank of *Maryland*, forty-seven hundred and fifty dollars and —— cents, for value received.

Chs. Gwinn, & *Co.*"

Endorsed—"Pay the contents to *Andrew Burt*, or order,
John Wallis, Junr."

This note, it was admitted, was made and signed by *Charles Gwinn*, the defendant, on behalf of himself and *William Smith*, trading under the firm of *Charles Gwinn* and Company, and that the defendant had survived *Smith*, who died before the institution of this suit; and that the name of *John Wallis*, junior, endorsed thereon, was in the proper hand-writing of said *Wallis*, and that the words "Pay the contents to *Andrew Burt*, or order," were written above the name of *John Wallis*, junior, on the back of the note, at the trial of this cause. The defendant then gave in evidence that the note was made and signed by *Charles Gwinn* and Company, as aforesaid, on the 6th of May 1813, and not on the 6th of March 1813, as the same purports to have been signed; and that the latter date was inserted in the note by mistake. That the note was given and signed at the instance and request of a certain *Joshua Dorsey*, to whom it was delivered on the 6th of May 1813, and upon the express stipulation and agreement that *Dorsey* would on the same day deliver into the hands of *Charles Gwinn* and Company, 300 bags of coffee, as a security for the payment of the said note at maturity, and to indemnify them against all loss on account thereof. He further gave in evidence that the 300 bags of coffee were not delivered to *Gwinn* and Company on the 6th of May 1813, or at any time since, and that they did not then, or at any time since, receive any consideration for the note. He also gave in evidence, that the note was drawn in blank, and was delivered to *Joshua Dorsey*, without the name of any payee being inserted therein, and that *Dorsey*, on the next day after the issuing of the note, applied to *John Wallis*, junr. for a loan of money, but could not obtain it; that *Dorsey*, however, in answer to the said application, received a letter from *Wallis*, stating that he, *Wallis*, would discount any good paper upon which *Dorsey* might wish to raise money. That *Wallis* had sometimes offered notes at different banks for the purpose of having them discounted for the use of *Dorsey*, and in such instances where the bank did discount them, *Wallis* paid over the net proceeds to *Dorsey*, only deducting the bank discount. That the business of *Dorsey* brought him and

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Wallis together almost every day upon money negotiations. That in consequence of *Wallis's* letter, stating that he could discount any good notes, *Dorsey* called on him with the note of *Charles Gwinn* & Co. when he found him very much indisposed, and out of humour, and disposed to reproach *Dorsey* for disturbing him. *Dorsey* informed him of his necessities, when after some hesitation he filled a check for $4000 on the *Mechanic's Bank*, and counted out $600 in bank notes, with which *Dorsey* retired. That no conversation, or contract or agreement whatever took place at the time of the transaction as to any discount which was to be deducted, legal or illegal, but that the foregoing statement is a complete detail of what did pass. That he *Dorsey*, the witness by whom these facts were proved, did not recollect any conversation that passed as to the note being offered for discount at the *Marine Bank*, but that he would not be understood to swear positively that such a conversation did not pass, as his situation at that time was such, and the haste in which the whole transaction took place, as prevented him from charging his memory so as to swear positively as to any fact further than is above stated. That the sum of $150, which was retained by *Wallis*, as *Dorsey* understood and presumed, was about the sum intended to be charged for discount upon said note, which sum was left in the hands of *Wallis* as discount or interest by *Dorsey*. That there was no contract or agreement whatever between *Wallis* & *Dorsey* for the return of the $150 to *Dorsey*; that *Dorsey* at the time was not in debt to *Wallis*; that *Wallis* had often discounted notes for *Dorsey*, sometimes at legal, and sometimes at usurious interest. That had not his circumstances terminated disastrously soon after this transaction, he would have called upon *Wallis* to know upon what account he retained the $150, and would have required a settlement as to that item. That although no notes were actually due by *Dorsey* to *Wallis*, at the time of this transaction, that *Wallis* held notes for, and upon which *Dorsey* was responsible, (which, however were not at maturity,) to a considerable amount of money, and particularly upon a premium insurance note which might have been, and he believes was issued by *Wallis*, for a part of which *Dorsey* was liable, although the note was not due. That the whole sum of money due by *Dorsey* at the time of his misfortunes, to *Wallis*, was due upon mercantile transactions between them prior to his failure; and that *Dorsey* is now indebted to *Wallis* in a large amount. That he did not communicate to *Wallis*, nor did *Wallis* inform him, or state his impression, that the $150 should be retained as a premium for lending the money; that his impression that it was an illegal premium was derived from the facts herein before stated, and that there was no contract between him and *Wallis*, that he *Wallis* should keep the $150 for discounting the said note. The defendant also offered evidence to prove, that when the said note become due he was called upon for payment thereof by a notary public, under the di-

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rection of the *Union Bank of Maryland*, and that when the said note was so put in the hands of the notary, and when the same became due, and payment thereof was demanded as aforesaid from him, neither the name of *Wallis* as payee, nor the name of any other person, was inserted in the body of the note, but that remained in blank, and was endorsed with the name of *Wallis*, and no other person. That when the note was put in the hands of the notary public by the bank for protest, the notary called at the compting house of *Wallis*, who was sick, and not there, but that he saw the clerk of *Wallis*, and informed him that the note had laid over at bank, and that he came to give notice of its non-payment by the drawers, and that it would be protested; that the clerk informed him that *Wallis* had left express directions that it should be protested. That the note came to his hands through the runner of the bank, who usually carried notes to the notary, and whose duty it was to carry the notes. That on the day on which he was on his way to the bank to return the note, he called on *Wallis* at his lodgings, and told him that the note was protested; that the only expression made by *Wallis*, in answer to the fact of the protest, was an inquiry by him (which appeared to be made with some degree of surprize,) why it was protested—that he did not want it protested. That the said note was protested in the manner as appears in the notarial protest produced, which the defendant offered in evidence, viz. That the notary on the 8th of May 1813, "exhibited the said original promissory note unto one of the partners of *Charles Gwinn* & Co. (the makers of the same,) and demanded payment of the contents thereof, the time limited therein for payment having elapsed. Whereupon the said partner answered, that said note would not be paid, and required the following reasons to be inserted: First, this note for $4750 is not due for 60 days to come. It was issued on the 6th of May, the day before yesterday, and which day it was to be dated. Secondly, the coffee for which this note was given in part is not delivered. And lastly, the holder was informed of this circumstance, and that the note would be corrected and settled the moment the merchandize was in hand, and until then will not be paid, all of which *John Wallis* was then advised of, and regular vouchers in the hands of *Charles Gwinn.*" That at the time the note was delivered to the notary for protest, there was no appearance of any pencil mark in the name of any person upon the back of the note. The defendant further gave in evidence by *Ralph Higginbothom*, (Cashier of *The Union Bank of Maryland,)* that according to the established usage and custom of banks in the city of *Baltimore*, and of the *Union Bank*, the last endorser on a promissory note, deposited in bank for collection, is considered as the holder and owner thereof, and the person for whose use and benefit the same is to be collected, and to whose credit the same is carried when paid. The plaintiff then gave in evidence by the same witness, that the

name of *Andrew Burt*, the plaintiff, was at the time, and before the note became due, endorsed in pencil on the back of the same; that although it is not the usual practice of the bank to admit endorsements in pencil, yet it is frequently done in cases considered as cash transactions, which the witness considers the present; that if the note had been paid by the defendant, the money would have been paid over by the bank to the plaintiff, whom the bank, according to the common usage in such transactions as the present, considered the holder and proprietor of the note, and to whom alone it would have been paid; that this transaction was not a regular bank transaction, or one appearing on the face of the books of the bank, but was a private cash transaction of *Burt* with *Wallis*. The plaintiff further gave in evidence, (by the witness by whom the defendant proved that the said note was written and delivered on the sixth day of May,) that the inserting therein the sixth day of March was done through mistake, and that when *Dorsey* applied to *Wallis*, and obtained from him the said sum of $4600, *Wallis* was lying very sick; that he complained much of being disturbed by the application of *Dorsey;* that there was no agreement made between *Dorsey* and *Wallis*, that *Wallis* should receive or retain any larger sum than legal interest, nor any conversation upon that subject. That the transaction took place in haste in consequence of the illness of *Wallis*. That when the said note was put into the bank for collection, it was endorsed with a pencil with the name of the plaintiff, and was the property of the plaintiff, and was by him put into the bank for collection; and that the day on which the note became due the defendant called at the *Union Bank of Maryland*, of which *Ralph Higginbothom* was cashier, and desired to see the note; that *Higginbothom* handed him the note; that the defendant said that there was a mistake in the date of it, and that if the note had been properly dated, he the defendant could have had no objection to pay it; that *Higginbothom* advised him to lodge the amount of the note in bank, as a bar against the protest, which would be made unless it was paid, (and as is usual in case of notes in dispute,) to guard against loss of credit by a protest. And that from the whole conversation, *Higginbothom* was under a *persuasion* when the defendant left the bank, that that course would be adopted. The plaintiff then, having executed a release to *Wallis* of all actions, liability, &c. produced *Wallis*, and offered to prove by him that the plaintiff was the holder of the said note, and had paid him the full value thereof before it became due, and that it was not deposited in the bank by him, *Wallis*, nor for his use, and that it was endorsed by *Wallis* to the plaintiff by *Wallis's* writing his name upon the back of it at the time of the delivery thereof by him to the plaintiff. The defendant objected to *Wallis* being sworn as a witness to prove the above facts. But the Court, [*Bland*, A. J.] was of opinion that he was a com-

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2. And thereupon *Wallis* being examined, gave in evidence that he received the note from *Dorsey* on the 6th of May 1813, dated March 6th, 1813, payable sixty days after date to ——, or order, and that he *Wallis* advanced to *Dorsey*, $4600 on the said 6th of May, and informed *Dorsey* that he would that day put the said note in the *Marine Bank of Baltimore* for discount, and would pay him the balance on the next day if he would call; that the said note was not discounted at the *Marine Bank*, on account of its having but a few days to run at the time it was so offered for discount; that when said note was so refused to be discounted at the *Marine Bank*, for the cause aforesaid, he *Wallis* received information from said bank, that if he would procure a note from *Charles Gwinn* and Company, payable at sixty days, it would be discounted, of which he sent to inform *Dorsey*, but understood that he had failed and was not to be seen by the clerk who was sent; and that *Wallis* endorsed said note before it was due, delivered it to the plaintiff, and received from him the whole amount mentioned in said note, without informing him of any of the circumstances concerning the manner in which he received it. That *Wallis* did not deposit said note in the *Union Bank*, nor was it to be collected for his use, nor was it protested at his instance or on his account, nor has he refunded any part of the amount of said note to the plaintiff; that the note was delivered by him to the plaintiff as the private property of the plaintiff, and not as teller of the *Union Bank;* that he *Wallis* had been in the habit of lending *Dorsey* money at legal interest, and frequently for several days without interest; that *Wallis* did not know at the time he received the said note, that it had not sixty days to run, nor did he know it till he sent it to be discounted at the *Marine Bank*, and received information therefrom as above mentioned; that it had but a few days to run, as he *Wallis* was very ill at the time he was as aforesaid applied to by *Dorsey* to advance him the money on said note; that *Dorsey* did not call on *Wallis* on the next day after the note was offered at the *Marine Bank*, nor at any other time, otherwise he *Wallis* would, after receiving the amount of the note from the plaintiff, have paid to *Dorsey* the balance of said note. That at the time *Wallis* advanced the money on said note, and at the time *Dorsey* failed, *Dorsey* was and still is largely indebted to *Wallis*. The plaintiff further gave in evidence, that it was and is the usage and custom of merchants, and of the different banks in the city of *Baltimore*, to discount notes drawn in blank. The plaintiff then prayed the direction of the court to the jury, that if the jury believed that the note was originally drawn by the defendant, and his late partner *William Smith*, in the manner the defendant offered in evidence, and that *Wallis* by endorsing and de-

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livering the note to the plaintiff transferred it to the plaintiff for value before it became due, and that the plaintiff, at the time of the said delivery and endorsement, and paying value for the same, had no notice or knowledge of any mistake being committed in the date of the note, or of any negotiation between *Charles Gwinn* and Company, and *Dorsey*, or between *Dorsey* and *Wallis*, respecting the note, then the plaintiff was entitled to recover. Which direction the court refused to give to the jury, and gave this direction—That if the jury believed from the whole evidence that the object and intent was, at the time the note was drawn, to lend or to borrow money, and that the note was made and drawn for that purpose, and a loan of money was thereby obtained at a rate of interest of more than six *per cent per annum*, then the note was usurious in its inception, and void, and the plaintiff could not recover; but on the other hand if they believed from all the evidence that the note was made and passed *bona fide* by the defendant and his late partner, and that a subsequent holder passed it for a usurious consideration, to which the plaintiff was in no manner privy, then the plaintiff was entitled to recover. The plaintiff excepted.

5. The plaintiff further prayed the court to direct the jury, that there was no evidence from which they could find that the note was given by *Charles Gwinn* & Co. to *Dorsey*, upon a usurious consideration. Which direction the court refused to give. The plaintiff excepted.

4. The plaintiff further prayed the court to direct the jury, that there was no evidence from which they could find that the note was negotiable by *Dorsey* to *Wallis* on a usurious consideration. This direction the court refused to give. The plaintiff excepted.

5. The plaintiff further prayed the court to direct the jury, that if they believed the whole evidence in the cause, that then the plaintiff was entitled to recover. This direction the court also refused to give. The plaintiff excepted.

6. The defendant then offered in evidence, that *John Reece*, the clerk of the defendant, did at the defendant's request go to the dwelling-house of *Wallis*, where he was confined from indisposition, and told him of the mistake that had been committed by the defendant in signing the note; which was antedated sixty days before its execution, and informed him that it was the desire of the defendant that he would correct the said mistake by altering the date to the true time, but that *Wallis* refused to make the said alteration, and said it should be protested in case it was not paid when it became due according to the existing date, and which reply the witness communicated to the defendant. The defendant then, in order to prove that

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Wallis was the holder, and was at the time of its being protested the holder of the said note, offered to give in evidence that the notary, on the evening of the day when the note was put into his hands to be protested, went to the compting house of *Wallis*, who was sick and not there, but that he saw the clerk of *Wallis*, and informed him that the note lay over at bank, and would be protested; whereupon the said clerk informed him the notary that *Wallis* had left express orders that the note should be protested. To this evidence the plaintiff objected. But the court was of opinion that the evidence was proper and competent, and permitted it to be given to the jury. The plaintiff excepted.

7. The plaintiff then moved the court to direct the jury, that that part of the testimony of *Dorsey* in the *first* bill of exceptions, where he states "*that the sum of* $150, *retained by Wallis, as he Dorsey understood and presumed, was about the sum intended to be charged for discount upon said note,*" was illegal and inadmissible, and ought not to be given to the jury. This direction the court refused, and permitted said testimony to be given to the jury. The plaintiff excepted. Verdict and judgment for the defendant, and the plaintiff appealed.

The cause was argued in this court on all the bills of exceptions, except the *first*, before EARLE, JOHNSON, and MARTIN, J.

Martin, (Attorney General,) and *Taney*, for the Appellant. The *first* count in the declaration is on the note to *Wallis*, and by him endorsed to the plaintiff. The *second* on a note payable to bearer, and that the plaintiff became the bearer and holder; and the *third* count is for money had and received. They contended, on the *second* bill of exceptions, that if the note was *bona fide* in its commencement, then it could not be vitiated by any subsequent usurious dealings, as to an innocent endorsee, without notice. The omission to insert in the note the name of the payee, will not prevent it from being an efficient instrument from its first commencement. On such a note the holder may sue, and has a right to fill up the name of the payee, or to declare on it as a note payable to bearer. A note originally valid is not made void as to an innocent endorsee, without notice, by any usurious dealings between the parties interested in the note before it came to his hands. *Parr vs. Eleason*, 1 *East*, 93. *Chitty on Bills*, 109, (101,) 78, 79, (note 7) 103. *Gibson vs. Minet*, 1 *H. Blk. Rep.* 569; and *Collins vs. Martin*, 1 *Bos. & Pull.* 650.

On the *third* bill of exceptions. There was no consideration passing between *Gwinn* and *Dorsey*, and of course there could be no usurious consideration. By refusing the plaintiff's prayer the court below seemed to think there was evidence of usury between *Gwinn* and *Dorsey*.

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On the *fourth* and *fifth* bills of exceptions. To constitute usury there must be an agreement between the parties. It need not be in words. But here the whole evidence goes to show that there was no agreement between *Gwinn* and *Dorsey* which could look like a usurious consideration. If the jury believed the evidence, they could not find the transaction usurious. They referred to the act of 1704, *ch.* 69. Stat. 12 *Car.* II, *ch.* 13; and 1 *Harr. Ent.* 603.

On the *sixth* bill of exceptions. The declarations of *Wallis's* clerk were improperly admitted in evidence against the plaintiff. If he had been the plaintiff's clerk it would not have been different. The declarations of an agent not engaged in the immediate business of his principal, are not evidence. 1 *Phill. Evid.* 77, 78.

On the *seventh* bill of exceptions. The evidence of *Dorsey*, in the latter part of his testimony, was an inference of his own, and was not founded upon any fact—it was a mere matter of opinion; and if the fact did not justify the inference, it is not evidence. 1 *Phill. Evid.* 209. *Hoddy's Lessee vs. Harryman*, 3 *Harr. & M'Hen.* 581. *Davidson's Lessee vs. Beatty*, *Ibid* 594.

Pinkney and *Winder*, for the Appellee. The only question is, whether there is any evidence to prove the transaction to be usurious. If the court below were right in the opinion given, as stated in the *second* bill of exceptions, then it was wholly unnecessary for the court to give any other opinion in the case. The evidence is clear, that *Wallis* was the real holder of the note, and not the plaintiff. There was an attempt made to smuggle in the name of the plaintiff as an innocent endorsee, to free the case from the charge of usury. If A gives B a note, for the purpose of borrowing money on it, and B does borrow money at a usurious interest from C, it is usurious in its inception. *Bailey's Dig.* tit. *Usury*, 411. *Wilkie vs. Roosevelt*, 3 *Johns. Cas.* 66. If *Dorsey's* name had been filled up in the note, he could not recover from the defendant, there being no consideration. The first consideration was when the note got into the hands of *Wallis*, and that was usurious, and no subsequent endorsee without notice could recover on it. The note had no legal commencement until it was filled up with the name of *Wallis*, who furnished the consideration. It could not be looked upon as a legal note until the blank was filled up. The jury were the proper judges whether or not there was any usury in the transaction. The act of 1704, *ch.* 69, clearly covers a transaction like the present.

On the *third* bill of exceptions. It was wholly out of the case as to the consideration between *Gwinn* and *Dorsey*. *Dorsey* was considered as the agent of *Gwinn*, and the court were well justified in refusing to give the direction asked for in this bill of exceptions.

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On the *fourth* and *fifth* bills of exceptions. If the court had given the directions prayed for in these bills of exceptions, it would have been taking from the jury the decision of facts.

EARLE, J. delivered the opinion of the court. In this case there are several bills of exceptions in the record, the first of which, taken on the part of the plaintiff below, (being the *second* in the record,) contains all the material facts in the cause, and presents for consideration the principal subjects of controversy between the parties.

In this bill of exceptions the court below was called on to direct the jury, that if they believed the note was drawn by *Gwinn* & Co. in the manner they offered in evidence, and that *John Wallis* had transferred the same to *Andrew Burt* for value, before it became due, and that *Andrew Burt*, at the time of the endorsement to him, had no notice of any negotiation between *Charles Gwinn* & Co. and *Joshua Dorsey*, or between *Joshua Dorsey* and *John Wallis*, respecting the said note, that then the plaintiff, *Andrew Burt*, was entitled to recover. This direction the judge very properly refused to give, having a just regard, as we presume, to the rights of the jury, upon whose province he must have encroached if he had gratified the prayer of the plaintiff. A variety of strongly contested facts were laid before the jury, and on the consideration of them they had to decide whether the note had been tainted with usury in its inception or negotiation, and it was not for the court to advise them as to the conclusions they were to draw the one way or the other. It is sometimes the duty of the court to decide the law upon facts, but it is after they are well ascertained by admissions or otherwise, and not while they are unsettled between the parties. The court below expressed an opinion, however, to the jury, in which we entirely coincide, as it is understood by us. We suppose the judge only intended to say, that if the note was drawn by *Charles Gwinn* & Co. to borrow money at illegal interest, and the holder did accordingly obtain money thereby on a usurious consideration, the note was void, and the plaintiff could not, under any circumstances, recover on it; and on the other hand, that if the note was *bona fide* in its origin, the plaintiff might recover on it, provided he had no knowledge of its being subsequently passed upon a usurious consideration. Some broad expressions used in the first part of the opinion seem to militate against this construction of it, but when we think that the whole is considered together, and particular attention is bestowed on the latter part of it, the meaning we have ascribed to the judge is obvious. Thus understood, the opinion does not suggest the question discussed on the argument, "whether a note drawn to borrow money is usurious and void in its inception, because money has been obtained on it by the holder on a usurious consideration, although the drawer, at the making of the note, had no knowledge such a use was to be

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made of it;" and the court do not mean to express any opinion on this point.

We are of opinion, that the court below was correct in refusing to direct the jury according to the plaintiff's prayers set forth in the *second*, *third* and *fourth* bills of exceptions, (being the *third*, *fourth* and *fifth* in the record.) The prayer in the *fourth* is as general as the prayer in the *first* bill of exceptions, and the *second* and *third* exceptions differ from them only in this, that the judge is required to direct the jury as to the question of usury on detached parts of the transaction, and not on the whole of it.

From the opinion of the judge expressed in the *fifth* bill of exceptions, (being the *sixth* in the record,) we dissent; and as to this point the judgment must be reversed. However the declarations of a merchant's clerk to a notary public in the course of business may be used for some purposes, they cannot be used in evidence to establish a fact not immediately connected with the solemnity of protesting. The defendant wished to prove that *John Wallis* was the holder of the note, and he proposed to do it by the admissions of *John Wallis*. This it was competent for him to do by correct and legal testimony, in which light we cannot consider the declaration of his clerk, not made on oath. Such declarations were yet more improper to discredit *John Wallis*, who was sworn as a witness in the cause. We must then view those declarations as inadmissible proof, and think the judge erred in suffering them to be laid before the jury.

We concur with the court below in the opinion delivered in the *sixth* bill of exceptions, (being the *seventh* in the record.) If all the expressions of the witness, *Joshua Dorsey*, objected to by the plaintiff, had been expunged from his testimony as detailed in the *first* bill of exceptions, what remained would have been wholly unintelligible, and if those most particularly objectionable, to wit, "as he *Dorsey* understood and presumed," had been erased, the witness would have been made to speak a language he never intended to utter. Remove those expressions and the testimony would read thus, "that the sum of $150, retained by the said *Wallis*, was about the sum intended to be charged for discount on the note," which evidence *Dorsey* never meant to deliver. Those last expressions of the witness taken alone, and unconnected with others used by him, import his opinion, and are in themselves inadmissible evidence; but the court cannot perceive how the judge could have separated them from the other parts of the testimony, without doing more mischief, than the retaining of them would have done.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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HAYWARD vs. CARROLL, *et al.*

The answer of one defendant in chancery cannot be read in evidence against a co-defendant

If the complainant is interested in establishing a fact by the evidence of a co-defendant, he should examine him as a witness

Where the contract of the parties is in writing, it can only be proved by its production and evidence of its execution, or by the admission of the party who executed it. A copy is not evidence, though proved to be a true copy, unless the original is lost, destroyed or in the possession of the adverse party.

The complainant in his bill must put in issue whatever he intends proving, otherwise it cannot be given in evidence.

The court of chancery, decrees only *secundum al. legata and probata.*

APPEAL from the Court of Chancery. The bill was filed by *R. Chamberlaine*, *G. R. Hayward* and *W. Hayward*, of whom *W. Hayward* is the only survivor, (now appellant,) against *D. Carroll* and *C. Carroll* of *Carrollton*. It states that *D. Carroll*, having mortgaged certain lands to *C. Carroll* of *Carrollton*, for money due to him, afterwards sold the greatest part of such lands to *R. Chamberlaine*, and bound himself, by his bonds duly executed, to make a title free from all incumbrances, on payment of the purchase money; for which *Chamberlaine* gave twelve bonds, payable at certain periods. That as many of these latter bonds were assigned by *D. Carroll* to *C. Carroll*, as *C. Carroll's* debt, secured by the mortgage, amounted to. That afterwards *R. Chamberlaine* assigned to *G. R. Hayward* and *W. Hayward*, the aforesaid bonds of conveyance, and they took up the bonds assigned by *D. Carroll* to *C. Carroll*, by giving their own to *C. Carroll*, on condition that he would assign to them the said mortgage deed, which he did accordingly; and they pray by their bill that they may have the benefit of this mortgage and assignment, for the purpose of compelling *D. Carroll* to redeem the mortgage so assigned to them, in the same manner as *C. Carroll* might if he had not received their bonds, and given them an assignment of such mortgage. The assignment of the mortgage stated in the bill is in the following words: "Whereas *Robins Chamberlaine* has contracted to purchase of *Daniel Carroll* of *Baltimore*, part of a tract of land on which the said *Carroll* now resides, and the whole of the said tract is either mortgaged to me, or the title to part of it still remains in me, I do hereby release all my right, claim and title, to the part of the said land contracted for by the said *Chamberlaine*, to Messrs. *George Robins Hayward* and *William Hayward*, of *Talbot* county, for value received of them. Witness my hand and seal this 21st day of March 1803. *Ch. Carroll of Carrollton*, (L. S.)

Test. *John Edmondson.*"

The answer of *C. Carroll* admits the execution of the original paper, but denies that he ever intended to assign the mortgage to the *Haywards*. The answer of *D. Carroll* denies the assignment, and insists on the extinguishment of the mortgage by the payment of the mortgage debt. Testimony was taken under commissions issued for that purpose; but it is not material to state it.

KILTY, Chancellor, (February term 1815.) It appears that the complainants *G. R.* and *W. Hayward* can have no right to relief on the bonds of conveyance, as *R. Chamberlaine* had no right to assign them after his insolvency, and the lands mentioned in them were returned in his schedule as his property. The chancellor is of opinion that the prayer for relief under the mortgage, cannot be granted, although there may have been some misapprehen-

sion on the subject, and *G. R.* and *W. Hayward* may sustain a considerable loss by the transaction. There is among the insolvent papers one purporting to be a receipt from *C. Carroll* for the bonds of *R. Chamberlaine*, and a bond of *D. Carroll*, and a copy of that receipt, which may be the one referred to in *D. Carroll's* answer, but it is not marked as filed, and it does not state what those bonds were received for. There is nothing to show that these bonds were taken as a security additional to the mortgage, and the chancellor is of opinion, that if *C. Carroll* had thought proper to assign the mortgage on receiving good bonds from *W.* and *G. Hayward*, he ought to have returned the bonds which he had received from *D. Carroll*, and that both ought not to have been assigned without his consent; which opinion appears to correspond with that of *C. Carroll* himself; and there ought to be the strongest proof of both being assigned as a ground for the relief claimed by the bill. There is reason to believe from the evidence, that the exchange of the bonds was agreed to at first without reference to the mortgage, and that the release or assignment of the mortgage, or a part of it, was proposed and agreed to afterwards. *Decreed*, that the bill be dismissed. From that decree *W. Hayward*, the surviving complainant, appealed to this court.

The cause was argued before Chase, Ch. J. and Earle and Dorsey, J.

Martin, (Attorney General,) for the Appellant.

Pinkney and *Harper*, for the Appellees, contended, 1. That the paper called an assignment was merely a release: 1st. From its express words. 2d. From its objects as apparent on the face of it. 3d. From the limitation or restriction of its operation to a part only of the mortgaged premises. To release a mortgage, as to a part of the mortgaged premises, in favour of one who had purchased that part, is a natural and common operation; but to assign a part only of a mortgage is at least a very novel thing.

2. That no parol evidence can be allowed to vary or in any manner affect the operation or construction of this paper; it not being a case of *latent ambiguity* or of *mistake*, which chancery can correct.

3. That if this paper were an assignment in the most express and formal words, it could not operate in favour of the complainants as assignees—because, as assignees they cannot be in a better situation than *C. Carroll*, the mortgagor and assignor, but must be affected by all the equity which would operate against him, in favour of the mortgagor. And the assignor in this case could not have a decree for a foreclosure or sale, because the mortgaged debt was paid. This payment was effected by the bonds of *Chamberlaine*, assigned to the mortgagor by *D. Carroll*, and paid to the assignee by the *Haywards*. This payment was not the less perfect or effectual for being made on bonds

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instead of money. It equally discharged the mortgage debt, and must forever protect the mortgagor.

4. That the complainants, not having produced the bonds assigned to them, nor in any manner accounted for them, are to be considered as having received payment of them, and consequently as satisfied for the mortgage debt. Therefore, if they were assignees, and not affected by the payment of the mortgage debt to their assignor, they must still be precluded from the relief they pray by this payment to themselves.

They also contended that *D. Carroll* having by his answer denied that there was any assignment, the complainants were put to the proof of it, and that no such proof was made. The admission of the paper by *C. Carroll* cannot make it evidence against *D. Carroll.* It is well established in chancery that the answer of one defendant cannot be evidence against another defendant. *Wych vs. Meal,* 3 *P. Wms.* 311, *(note.)* *Anon.* 2 *P. Wms.* 300. 2 *Eq. Ca. Ab.* 67; and 1 *Harr. Chan. Prac.* 185.

Dorsey, J. delivered the opinion of the Court. *William Hayward* and *George R. Hayward,* who were complainants in the court of chancery, claim the benefit of a mortgage executed by the defendant *Daniel Carroll,* to *Charles Carroll* of *Carrollton,* the other defendant, on the ground that the latter had, for a valuable consideration, assigned the same to them; and in their bill they insert a copy of a paper, which they call an assignment, purporting to be executed by *Charles Carroll,* and attested by *John Edmondson* as a witness. *Charles Carroll,* in his answer, admits the execution of the original paper, but denies that he ever intended to assign the mortgage to the *Haywards.* The defendant, *Daniel Carroll,* by answer, not only positively denies the assignment, but insists on the extinguishment of the mortgage by the payment of the money.

It becomes necessary to inquire, whether the assignment alleged by the *Haywards* to have been made in their favour, is established by legal evidence.

The answer of *Charles Carroll* admits the execution of the original paper, of which a copy is exhibited, and therefore, with reference to him, the court have a right to decide on its operation. But as *Daniel Carroll,* by his answer, denies the execution of the assignment, the fact of such assignment is by him put in issue, and must therefore be proved. Where is the proof of this fact? Is it to be found in the admission of *Charles Carroll,* confessing the execution of the paper termed an assignment? It is not; because it is an established principle of evidence that the answer of one defendant cannot be read in evidence against a co-defendant. If the complainants were interested in establishing a fact by the evidence of a co-defendant, they might have examined him as a witness, on interrogatories, and the witness then would have been subject to the cross examination of the other defendant. To withhold from

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such defendant the privilege of cross examination, would be unjust, and this injustice must necessarily result from the practice of permitting the answer of one defendant to be read in evidence against a co-defendant.

Let us proceed one step further, and see whether the fact of assignment is proved by *Edmondson*. He proves that the *Haywards* requested him to receive from *Charles Carroll* an assignment of the mortgage in their favour, and that *Charles Carroll* did execute such an assignment, and delivered it to the witness, who afterwards gave it to the *Haywards*.

The assignment here alluded to has not been proved as an exhibit in the cause. That *Charles Carroll* executed a paper, which was deemed by the witness to be an assignment, is proved. But as the paper was in existence, its execution might and ought to have been proved; and even the copy exhibited by the complainants could not be evidence if it had been proved to be a true copy, (and of which there is no proof,) unless the original was lost, destroyed, or in the possession of the adverse party. The testimony of this witness, as well as the allegation in the complainants' bill, shew that the assignment did not rest in parol. As the contract, therefore, of the parties, was reduced to writing, it can only be proved judicially, by the production and proof of the written agreement, or by the admission of the defendants in their answers; as neither of those facts exist, we are of opinion that the pretended assignment is not proved.

It was urged by the appellant's counsel, that even this view of the case was not fatal to the claim of the complainants, inasmuch as the assignment to them by *Charles Carroll*, of *Robins Chamberlaine's* bonds, must be considered in equity as an assignment of the mortgage. Supposing, for the sake of argument, (and we are only prepared to make the admission for that purpose,) that such would be the effect, still it is evident that the chancellor's decree ought to be affirmed. The complainants sought relief on the ground that *Charles Carroll*, by an agreement reduced to writing, did assign to them the mortgage. This allegation is put in issue. The complainants fail in establishing their equity as displayed in their bill, but prove a case entirely distinct and different from it. We say entirely different, because the bill, so far from relying on the assignment of *Chamberlaine's* bonds as the foundation of equity, does not even state that *C. Carroll* had possession of them. Can this new case, arising out of facts, not one of which were put in issue by the bill, entitle the complainants to a decree? If we were to answer affirmatively, we should prostrate that long established rule which declares that the complainant in his bill must put in issue whatever he intends proving, otherwise he will not be permitted to give it in evidence; and therefore it is that the court of chancery pronounces its decree *secundum allegata*

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and probata, to shield the defendants against the fatal consequences of surprize.

As there is no legal evidence of an assignment of the mortgage in the record, it follows that the chancellor did not err in dismissing the complainants' bill. His decree ought, therefore, to be affirmed.

CHASE, Ch. J. delivered his opinion, affirming the decree of the chancellor upon the points arising under the decree.

DECREE AFFIRMED.

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W W a trustee appointed by the court of chancery for selling the real estate of A C, sold that part of it called *B*, to J. A, and took his bond for the payment of the money, with R F his surety, and it was understood that the land was not to be conveyed until the purchase money was paid. J A soon after sold *B* to R G, for the sum he had contracted to pay the trustee for it; and to accommodate J A, R G, with a full knowledge that the trustee had not been satisfied, went on to pay J A the sum he engaged to pay for the land, and received from him an assignment of his claim against A C's estate, which at first was supposed to be greatly more than sufficient to discharge all the purchases J A had made of the trustee. Upon the final settlement of the affairs of A C, his estate proved insolvent, and the creditors being put to a dividend, the sum to be received by R G on J A's assignment, was not adequate to the payment of the purchase money due the trustee, who withheld the conveyance from R G to whom he was ordered by the chancellor to convey *B* on the whole purchase money being paid and sued R F as surety of J A on the bond before mentioned. A judgment was obtained against R F for a balance of the purchase money, which on his filing his bill he brought into chancery, and claimed to have the amount paid by R G who had purchased of J A with notice.—*Decreed*, that the amount, so recovered against R F should be brought into court by R G by a limited time, to be paid to R F, or that the tract of land called *B*, or as much as was necessary, should be sold to raise the said sum and the interest.

The vendor of a real estate, without deed, has an equitable lien on the land sold, for the payment of the purchase money, into whatever hands it may pass, *with notice* that the contract of sale has not been complied with by the vendee: and the purchaser of an equitable estate with notice, is liable to the same equity and is bound to do that which the person he represents would be bound to do.

When a purchaser of a trustee sells to another, he cannot place him in a more eligible situation than he has himself. He cannot, by any act of his, place his surety for the purchase money in a worse situation than he would have been in, if the purchaser had not so sold.

A surety paying the debt of his principal, shall be considered to stand in the place of the creditor for any purpose to answer the ends of justice; and he is entitled to an assignment of the bond of his principal that he may pursue his remedy against the principal. And if the equitable estate in the land purchased of the principal, and for which the surety became answerable for the purchase money, was about to be sold for the payment of debts, the surety would so far represent the trustee who sold the land, as to have a decided preference over all the other creditors of the principal. He would also represent him so as to obtain a reimbursement of a person purchasing from his principal, for the money the surety has paid the trustee

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auditor's report that *Contee's* estate was insolvent, and that *Allstan* was only entitled to a dividend, much less than the amount of his claim proved before the auditor. That *Ghiselin* paid to *Allstan* a considerable sum more than his dividend, who has retained the same in his hands, and has not paid the same to the trustee. That suit has been brought against complainant, as *Allstan's* security, and judgment has been recovered for the balance of the purchase money due upon said sale. That if said balance is recovered from him, and the land conveyed to *Ghiselin*, he *Ghiselin* will have received credit for a considerable sum paid to *Allstan* in his own money, which ought to have been paid to the trustee, and which is a lien on the land purchased. The bill prays that *Ghiselin* be decreed to pay such sum as may be due, after deducting *Allstan's* dividend, and such other dividends as he may have been authorised to receive, and such sums as he may have paid to the trustee, or that the land be sold to indemnify complainant as *Allstan's* security. On petition of complainant, the money recovered against him was ordered to be paid into court, and an injunction issued to stay execution on the judgment recovered against him by the trustee. The answer of *Ghiselin* admits the decree for the sale of the land; that he purchased from *Allstan*, and took an assignment of his claim; that he made sundry payments to *Allstan*, and that when he made the last payment, *Allstan's* dividend was not finally ascertained. That when it was finally adjusted, the amount, added to the payments that had been made to the trustee, left a balance due for the land he purchased from *Allstan* of $448 22, with interest, as is set forth in the answer of the trustee, which sum of money, although paid by *Ghiselin* to *Allstan*, still remains due to the trustee, as he informed *Ghiselin*.

Kilty, Chancellor, (July Term 1816,) *Decreed*, that unless the defendant, *Ghiselin*, shall before the 23d of October next bring into court, to be paid to the complainant, the sum of $448 22. with interest from the 17th of June 1811, and costs, the land in the proceedings mentioned shall be sold, &c. From this decree the defendants appealed to this court.

The cause was argued before Chase, Ch. J. and Earle and Martin, J.

Martin, (Attorney General,) and *Stephen*, for the Appellants, contended, 1. That the surety of *Allstan* cannot avail himself, on payment of the balance of the purchase money, of the equitable lien existing between vendor and vendee. 2. That *Allstan* ought to have been made a party, unless stated by the complainant to have been *insolvent*, because if he was *able to reimburse* his surety, there was no occasion to resort to the land in the hands of *Ghiselin*.

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On the *first point* they referred to *Duvall vs. Bibb*, 4 *Hen. & Munf.* 113. *Pollexfin vs. Moore*, 3 *Atk.* 272; and *Sugd.* 358.

Brewer, and *Brewer, Jr.* for the Appellee, cited 2 *Madd. Chan.* 105, 507. *Taylor vs. Stibbert*, 2 *Ves. jr.* 437. *Freeland vs. Gantt and Childs*, in the court of chancery. *Ex parte Turner*. 3 *Ves.* 243; and *Latouche vs. Dunsany*, 1 *Sch. & Lef.* 162.

Martin, J. delivered the opinion of the court. The court has considered the arguments of the counsel in this case, and examined the record carefully. The case appears to be this.—*W. G. D. Worthington*, the trustee for selling the real estate of *Alexander Contee*, deceased, sold that part of it called *Brookfield* to *James Allstan* for $5,100, and took the bond of the purchaser for the payment of the purchase money, with *Robert Fergusson* his security; and it was understood that the land was not to be conveyed until the purchase money was paid. *James Allstan* soon after sold *Brookfield* to Doctor *Reverdy Ghiselin* for the sum he had contracted to pay the trustee for it; and to accommodate *Allstan*, *Ghiselin*, with a full knowledge that the trustee had not been satisfied, went on to pay *James Allstan* the sum he engaged to pay for the land, and received from him an assignment of his claim against *Alexander Contee's* estate, which at first was supposed to be greatly more than sufficient to discharge all the purchases *James Allstan* had made of the trustee. When *Ghiselin* made the last payment to *James Allstan*, whose circumstances were on the decline, he took from him a bond with security to indemnify him in the payment. Upon the final settlement of the affairs of *Alexander Contee*, his estate proved insolvent, and the creditors being put to a dividend, the sum to be received by Doctor *Ghiselin* on *James Allstan's* assignment, was not adequate to the payment of the purchase money due the trustee, who withheld the conveyance from *Ghiselin*, to whom he was ordered by the chancellor to convey *Brookfield* on the whole purchase money being paid, and sued *Robert Fergusson*, as security of *James Allstan* in the bond passed as aforesaid. A judgment was obtained against *Robert Fergusson* for a balance of the purchase money, which he brought into chancery, and claimed to have the amount paid by Doctor *Ghiselin*, who had purchased of *James Allstan* with notice. The chancellor decreed that the balance, (the sum of $448 22,) should be brought into court by *Ghiselin*, by a limited time, or that the tract called *Brookfield*, or as much as was necessary, should be sold to raise this sum, and the interest; and whether the chancellor was correct in this adjudication is the question for this court now to decide.

The vendor of a real estate, without deed, has unquestionably an equitable lien on the land sold, for the payment of the purchase money, into whatever hands it may pass,

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with notice that the contract of sale has not been complied with by the vendee; and the purchaser of an equitable estate *with notice*, is liable to the same equity, stands in the place of and is bound to do, that which the person he represents would be bound to do. 2 *Ves. Jun.* 439. In the case under consideration *Worthington*, the trustee, has an equitable lien on *Brookfield* which is in the possession of Doctor *Ghiselin* by purchase of *Allstan*, and *Ghiselin* who represents *Allstan* is liable to the same equity, and is bound to do, at least as far as the vendor is concerned, whatever *Allstan* would have been bound to do if he had not sold to *Ghiselin*. But it is contended that *Robert Fergusson* is not to be considered in the place of *Worthington*, the trustee, to obtain redress of Doctor *Ghiselin*; and it is asserted that no authority can be produced to support the position, that a person claiming under a vendee shall have the benefit of an equitable lien on the lands, in the hands of a purchaser *from* the vendee, although such purchaser be a purchaser with notice. Supposing that no express authority can be found to maintain this position, the inquiry may be made, is not *Fergusson's* case within the reason of those cases that have been cited on the argument and acknowledged to be the law? If Doctor *Ghiselin* stands in the place of *Allstan*, and is liable to the same equity, he is bound to do whatever *Allstan* would have been bound to do, if he had retained the tract called *Brookfield*. As far as the trustee is concerned, *Brookfield* is incontrovertibly so bound; and it is not perceived that any additional hardship would be imposed on him, by subjecting him to payment of the claims of *Fergusson*, who by his payment to the trustee has placed himself in his situation. Doctor *Ghiselin* purchased with a full knowledge that the purchase money on *Brookfield* would be exacted of him by the trustee, and it was his folly to part from it to *Allstan*, and his indiscretion ought not to prejudice others.

It seems to the court it would be a correct position to state, that a man cannot sell more than he has, and that when *Allstan* sold to Doctor *Ghiselin*, *with notice*, he could not place him in a more eligible situation than he occupied himself. Besides it would be strange if *Allstan*, by any act of his, could place his own security in a worse situation than he would have been in if the act had not been done.

It has been admitted by the counsel for the appellants, that if *Brookfield* had remained undisposed of in the hands of *Allstan*, and *Fergusson* had been compelled to pay the purchase money to the trustee, *Fergusson* would have a lien on the property to reimburse him the sum he had paid as security for *Allstan*. But it has been contended, the moment *Allstan* parted with his equitable interest to *Ghiselin*, that this lien ceased, and *Fergusson* was without a remedy. If this doctrine is correct, *Ghiselin* might retain the possession of the land without paying one cent of the purchase money, (unless that payment had been enforced by *Allstan,)* and *Fergusson*, the security of *Allstan*, be

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compelled to pay the whole sum to the trustee, without indemnity. But again, suppose *Ghiselin*, with a knowledge of the transaction, and that the purchase money had not been paid to the trustee, had thought proper to pay the whole purchase money $5,100, to *Allstan*; that *Allstan* had fraudulently applied it to his own purposes, and did not pay it over to the trustee, and the trustee, by a suit on the bond, compelled *Fergusson* to pay the money to him, *Ghiselin* would then remain the undisturbed possessor of the land, *Allstan* would retain the $5100 paid to him by *Ghiselin*, and *Fergusson*, the innocent security, have to sustain the whole loss. Thus by the fraud of *Allstan*, and the indiscretion or connivance of *Ghiselin*, *Fergusson* would lose the benefit of that lien or security on the land given to him by law, as an inducement to enter into the bond, and *Allstan* retain the $5100 as the fruits of his fraud and injustice. A case too glaring to be countenanced by a court of equity.

It is admitted too, that for many purposes the security paying the debt of his principal shall be considered to stand in the place of the creditor, and if he can be so placed for any one purpose to answer the ends of justice, the court cannot understand why he may not be so considered for every purpose where the same ends are in view. *Robert Fergusson* is entitled to an assignment of the bond of his principal at the hands of *Worthington*, the trustee, that he may pursue his remedy against *Allstan* and his estate. If the equitable estate in *Brookfield* yet remained in *Allstan*, and his heirs, and it was about to be sold for the payment of debts, it is conceded that *Robert Fergusson* would so far represent *Worthington*, the trustee, as to have a decided preference over all the other creditors of *Allstan*. Why then should he not represent him in the case before us to obtain a reimbursement of Doctor *Ghiselin* for the money he has paid the trustee? It appears to the court to be equitable and just that he should; and we do therefore entirely concur in the judgment of the chancellor, and are of opinion that his decree in this case be affirmed.

Chase, Ch. J. I am satisfied, on considering all the circumstances attendant on this case, that *Robert Fergusson* the security for *James Allstan*, who purchased of *Worthington*, has no lien on the land called *Brookfield* purchased by Doctor *Ghiselin*. In general the lien is confined to the vendor and vendee, and those claiming under them, and cannot be extended in equity to a third person. *James Allstan*, the first purchaser of *Brookfield* from the trustee, could not obtain a conveyance from the trustee until the whole purchase money was paid, nor could Doctor *Ghiselin*, his assignee. Doctor *Ghiselin*, on complying with his contract with *James Allstan*, (and it is admitted he has paid the whole purchase money,) had a right to call on *James Allstan*, and his security, *Robert Fergusson*, to pay the trustee pursuant to their engagement. *James Allstan*

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has transferred all his interest in *Brookfield* to Doctor *Ghiselin*, and has no lien on it. *James Allstan*, and his security, were bound to pay the trustee, and have done so. The security, by paying part of the money to the trustee, cannot stand in the shoes or place of the trustee, nor could he acquire any lien on *Brookfield* by making such payment. The right of the security cannot be preferable to that of his principal. *James Allstan* and his security entered into the bond to the trustee to secure the payment of the purchase money, and prior to the assignment made by *James Allstan* to Doctor *Ghiselin*, who knew there was sufficient security given to the trustee for payment of the purchase money before he took the assignment. *Robert Fergusson*, the security of *James Allstan*, never had any interest in *Brookfield*, whereby a lien on it could be created. By becoming security he made himself responsible for the purchase money, and for what he paid he has a claim on *James Allstan*, and his estate, for indemnification, but no lien on *Brookfield*.

I am of opinion, that the decree of the chancellor ought to be reversed, and a decree passed directing the trustee to execute a deed of conveyance to Doctor *Ghiselin* for *Brookfield*.

DECREE AFFIRMED.

CHAPMAN vs. DIXON'S Adm'x.

JUNE.

APPEAL from *Charles* County Court. *Assumpsit* brought on the 12th of August 1815. The declaration contained counts for sundry matters and articles properly chargeable in account; for money paid, laid out and expended; for pasturage for horses, &c. *Quantum meruit* for matters and articles properly charged in account, sold and delivered, and pasturage furnished, &c. For the hire of negroes, &c. and on an *insimul computassent* with the administratrix, and her promise to pay, &c. *Non assumpsit* and the act of limitations pleaded.

In an action of *assumpsit* against an administratrix, she pleaded the act of limitations; and to avoid the bar the plaintiff proved, that immediately preceding the institution of the suit, he presented his account to the defendant, who said she did not wish to see it; that she would pay all just claims against the estate of the deceased, as soon as she obtained money, and that she would put the money into the hands of the Orphans' Court, to have the same adjusted, and that if the plaintiff would pass his account with the Orphans' Court, she would pay it. *Held*, that these declarations of the administratrix were sufficient to prevent the operation of the act of limitations. By announcing her determination to pay all just claims, she waived all benefit of the statute, and her subsequent promise to pay the account, if the Orphans' Court would pass it, demonstrated her willingness to pay the claim, if it was found to be correct. Per *Martin* and *Dorsey*, J.

Where a declaration in *assumpsit* against an administratix contained sundry counts on promises made by the defendant's intestate, and a count, stating that the defendant administratrix aforesaid, after the death of the intestate, accounted with the plaintiff, &c and upon that accounting the intestate was found indebted to the plaintiff in, &c. and that *defendant*, in consideration thereof, promised the plaintiff to pay him, &c. *Held*, that as it is not stated that the defendant promised as administratrix to pay, her declarations to pay the claim could not disprove her plea of the act of limitations. Per *Martin* and *Dorsey*, J.

Whether or not an agreement between the plaintiff and defendant to refer the matter in dispute to arbitration, will operate to take the case out of the act of limitations? *Quere.*

Where the jury omit to find on one of the issues joined, it cannot operate to the prejudice of the plaintiff, if his declaration is so essentially defective that no judgment can be rendered thereon in his favour. Per *Martin* and *Dorsey*, J.

At the trial the plaintiff, (the appellant,) produced *J. B. Wills* a competent witness, who gave in evidence, that

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himself and others had been appointed referrees to adjust and determine a claim on the part of the plaintiff against the defendant's intestate; and on the examination of the subject, the account, on which the present suit is brought, was put into his hands by the plaintiff. That the account was headed: "Mr. *Thomas Dixon* Dr. to *Samuel Chapman*, Cr." The debits therein commenced on the 20th of June 1805, and ended on the 31st of December 1812, and the credits commenced on the 24th of February 1806, and ended on the 11th of April 1812, and there was a certificate by a justice of the peace that the account was truly copied from the books of accounts of the plaintiff, which books appeared to be legally proved. This witness also proved, that the defendant also produced an account against the plaintiff. That considering that the reference authorised them to adjust this claim, they proceeded to adjust and examine the accounts, and that he read over the plaintiff's account to the defendant, and she only disputed the charges for pasturage, bark and sheep skins, and perhaps the charge for wood. The plaintiff gave substantially the same evidence, by *G. D. Parnham*, another competent witness. It was further proved, that on comparing the accounts, the defendant claimed credits to the amount of a few dollars more than were allowed in the plaintiff's account, and that the plaintiff then agreed to allow all the credits claimed. This conversation took place in the winter of the year 1815. The plaintiff also proved, by other competent witnesses, that the plaintiff's account before mentioned, was presented by him to the defendant in August 1815, before this suit was brought, and laid by him before the defendant, saying there is my account. That she replied she did not wish to see it; that she would pay all just claims against the estate as soon as she obtained money; that she would put the money into the hands of the orphans court to have the same adjusted, and that if the plaintiff would pass his account with the orphans court she would pay it. To this the plaintiff answered, that the judges of the orphans court would not trouble themselves with the payment of debts. He also proved that the defendant's intestate had received from him wood, bark and sheep skins, and had pastured his stock; but could not shew the quantity of either. The defendant then prayed the opinion of the court, that the plaintiff on this evidence was not entitled to recover. And the Court, [*Johnson*, Ch. J. and *Key*, A. J.] were of opinion, and so directed the jury, that the evidence, as delivered by the referrees, must be taken altogether, and not the defendant's admissions of some of the items, disregarding what she said of the others; and that the evidence disclosed by the witnesses at the last time the account was presented, did not take the case out of the act of limitations, inasmuch as by the account itself the plaintiff had not complied with the condition of the promise by getting the account passed the orphans court. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this court.

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The cause was argued before Chase, Ch. J. and Earle, Martin, and Dorsey, J.

Chapman and *Magruder*, for the Appellant. To shew that there was sufficient evidence to take the case out of the act of limitations, they referred to *Barney vs. Smith*, (*Ante* 485). 1 *Esp. Dig.* 287, 288, (151.) *Yea vs. Fouraker*, 2 *Burr.* 1099. *Bryan vs. Horseman*, 4 *East*, 599. *Catling vs. Skoulding*, 6 *T. R.* 189. *Laurence vs. Worrall*, *Peake's N. P.* 93. *Lloyd vs. Maund*, 2 *T. R.* 760. *Webber vs. Tivill*, 2 *Saund.* 127, *(note* 6*)*; and *Davies vs. Smith*, 4 *Esp. Rep.* 86.

Martin, (Attorney General,) for the Appellee.

Dorsey, J. The declaration in this case contains *five* counts, on promises made by the defendant's intestate to the plaintiff; the *sixth* and last count states that the said *Margery Dixon*, administratrix as aforesaid, after the death of the intestate, accounted with the plaintiff concerning divers sums of money due and owing from the intestate, and that upon such account the intestate was found indebted to the plaintiff in the sum of three hundred pounds, and that the said *Margery*, in consideration thereof, promised the plaintiff to pay him the said sum of money. The defendant pleaded, that neither the intestate, nor herself, assumed in manner and form as the plaintiff had declared; and further pleaded *non assumpsit infra tres annos*, and *actio non accrevit infra tres annos*, on which issues were joined. The jury, by their verdict, find that the intestate did not assume upon himself in manner and form as the plaintiff had declared.

By the proof stated in the bill of exceptions, it appears that the plaintiff's cause of action accrued three years before the institution of the suit. And the plaintiff, to avoid the bar set up by the defendant in her *second* and *third* pleas, proved that the plaintiff and defendant had agreed to refer the claim of the former to arbitration; that immediately preceding the institution of the suit, to wit, on the 15th of August, the plaintiff presented his account to the defendant, who said she did not wish to see it; that she would pay all just claims against the estate of the deceased, as soon as she obtained money, and that she would put the money into the hands of the orphans court, to have the same adjusted, and that if the plaintiff would pass his account with the orphans court she would pay it.

On this proof the counsel for the defendant prayed the direction of the court to the jury, that the plaintiff was not entitled to recover. The court directed the jury that the conversation on the 15th of August did not take the case out of the act of limitations, as the plaintiff had not complied with the condition of the promise, by procuring his account to be passed by the orphans court. To this opinion the plaintiff excepted. That the declarations of the

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of the defendant on the 15th of August would be sufficient to prevent the operation of the act of limitations in a case where, from the pleadings, they were legally admissible, I have no doubt. By announcing her determination to pay all just claims, she waived all benefit of the statute, and her subsequent promise to pay the account if the orphans court would pass it, demonstrates her willingness to pay the claim, if it was found to be correct.

The authority of *Heyling vs. Hastings*, 1 *Salkeld*, 29, is decisive on this point. The defendant being requested to pay for goods which he had purchased six years before the institution of the suit, denied that he had bought the goods, but further said, "prove it and I will pay you." This promise was deemed sufficient to relieve the case from limitation.

The next question is, what is the effect of those declarations with reference to the pleadings in the cause? The *five* first counts are founded on assumptions made by the intestate to the plaintiff; under neither of those counts was the said testimony admissible to defeat the defendant's pleas of limitations. *Sarell vs. Wine*, 3 *East*, 408. *Secar vs. Atkinson*, 1 *H. Blk. Rep.* 102. 1 *Chitty's Plead.* 204, 205. 2 *Saunders*, 63, *(note 6.)*

Upon an examination of the *sixth* count it will be found, that the assumption therein stated is made by the defendant *in proprio jure*, and not as administratrix. The count does not state that the defendant, as administratrix, promised to pay the balance found due on the accounting, but avers the assumption to be made by her, without any reference to her representative character. The words are, "that the said *Margery*, in consideration thereof, promised to pay." True it is that the count commences by saying, "that the said *Margery*, administratrix aforesaid, accounted with the said *Samuel Chapman*; but this does not amount to an averment that she accounted as administratrix; and even if it did, there are no words of reference by which her promise to pay could be construed into a promise to pay in *autre droit*. The case of *Henshall vs. Roberts*, 5 *East*, 150, is full to this point.

In this view of the case there is no averment in the record of any promise made by the defendant as administratrix, and therefore her declarations, according to the authorities herein before referred to, could not disprove her *second* and *third* pleas.

If the *last* count would, when standing alone, be sufficient to charge the defendant personally, its association in this case with the other counts, taints the whole proceeding, by occasioning a misjoinder in action. But I am clear in the opinion that the last count, whether standing alone or in association with others, is essentially erroneous; as it states no promise or assumption by the intestate, or by the defendant as administratrix, it cannot charge the defendant as administratrix. It cannot charge the defendant personally, because no legal consideration is shown to support

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her promise. If she was indebted in one right, and promised to pay in another right, from this promise she derived no advantage or convenience, and therefore the demand cannot be supported against her in her personal capacity. *Mitchinson vs. Hewson, 7 T. R.* 344.

It was urged by the plaintiff's counsel, that the jury did not find the whole matter in issue, as they had omitted to state in their verdict whether the defendant had assumed or not. Under the view which I have taken of the pleadings, such omission cannot operate to the prejudice of the plaintiff, as the count containing the promise of the defendant was so essentially defective that no judgment could be rendered thereon in favour of the plaintiff. I do not mean to decide the question how far an agreement between the plaintiff and defendant, to refer the matter in dispute to arbitration, would operate to take a case out of the act of limitations.

MARTIN, J. concurred with DORSEY, J.

JUDGMENT AFFIRMED.

BECK vs. THOMPSON & MARIS.

DECEMBER.

ERROR to *Prince George's* County Court. *Assumpsit* on a promissory note drawn by *S. W. Beck* on the 14th of March 1810, for $1569 27, payable 21 months after date to the defendant, (now appellant,) or order, and by him endorsed to the plaintiffs, (the appellees.) The declaration contained two counts; the first on the note, in which the demand is stated to have been made on the drawer, "afterwards, and after the end and expiration of the said 21 months in the said note mentioned; that is to say, on the 14th of December 1811," and notice to the defendant, &c. The other count was for money lent and advanced. The general issue was pleaded; and at the trial the plaintiffs proved the hand-writing of the drawer of the note, and then offered in evidence, by a competent witness, that he had seen the defendant write and sign his name, and was acquainted with his hand-writing, and that he believed that the endorsement on the note was in his hand-writing. He also swore another witness, *James S. Morsell*, who proved that the note in question was brought, together with another note drawn and endorsed by the same persons, and put into the hands of the witness sometime before the note in suit became due, and remained in his hands for a considerable time after it became due, and that the witness had no knowledge of the money due on it ever having been de-

In an action on a promissory note dated the 14th of March 1810, and payable 21 months after date, a count in the declaration on the note, stated the demand of payment to have been made "afterwards, and after the end and expiration of the said 21 months; that is to say, on the 14th of December 1811" —*Held*, that this count was erroneous, and that no recovery could be had on it.

It is not necessary to declare on a promissory note, but it may be given in evidence on a count for money lent and advanced, where there is a privity between the plaintiff and defendants, as that of a payee and drawer and endorsee, and his immediate endorser.

If an endorser, with the knowledge that the holder of a promissory note has not used due diligence in demanding payment of the maker, promise to pay the amount of the note, such promise is a waiver of the holder's neglect to give the notice.

It is an established maxim of our law, equally applicable to civil and criminal cases, that *ignorantia legis non excusat*. Per *Dorsey*, J.

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manded of *S. W. Beck*, the drawer; that some days after it became due, the defendant came to the office of the witness, and said that the witness need not have sent *Nicholls* to his house to give him notice that the note was not paid, that he knew that the notice of nonpayment was not properly given, and not given for several days after the note was due, and that the demand was not made of the drawer. That to this the witness replied, that that was a matter to be settled by a court and jury, if necessary, hereafter, and he would endeavour to prove that due notice was given. The defendant thereupon told the witness that it was his intention to pay the notes; that he was bound to pay his son's debts, but wanted time. To this the witness replied, that he could have time if he gave security by a deed of trust on his land. The defendant asked what time? and was told as much time as it would take to recover by a suit at law, which the witness supposed to be 18 months. To this the defendant agreed; and it was also agreed that *William S. Nicholls* should be the trustee in the deed. A day was appointed to meet at *Bladensburgh* to execute the deed. The witness met there on that day. The defendant was not there, but his son was. The defendant afterwards came and told witness he could not execute the deed unless he could get a longer indulgence, as long a time as he could get if a suit was brought in the county court, and afterwards removed to the court of appeals. The witness refused to give this indulgence, and immediately thereafter ordered this suit to be brought. The witness did not recollect that he showed the note to the defendant, but the witness had no other notes except those two, and the conversation related to two notes due to the plaintiffs. The plaintiffs offered no other proof relative to a demand of the amount of the note of the drawer, or of notice of nonpayment to the defendant, or of the endorsement of the note. The defendant then prayed the opinion of the court to the jury, that this testimony was not sufficient to entitle the plaintiffs to a verdict. This opinion the Court, [*Johnson*, Ch. J. and *Plater*, A. J.] refused to give, being of opinion, that if the jury should find from the evidence that the note was endorsed by the defendant, and that with a knowlege that the drawer had not been duly called on for payment, and that notice of the nonpayment had not in due time been communicated to the defendant, and that in consequence thereof he was not in law answerable for the note; yet, if with this knowledge they should find that he promised to pay the same, that then the want of notice of the nonpayment by the drawer did not release him from the claim, and that the plaintiff was entitled to recover in that event in this action. The defendant excepted; and the verdict and judgment being against him, he brought a writ of error to this court.

The cause was argued at the last term before CHASE, Ch. J. and MARTIN, and DORSEY, J.

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Ridout, for the Plaintiff in error, contended that the opinion of the court below was erroneous on two grounds—1. Because they did not grant the defendant's prayer; and 2. Because the opinion they gave the jury was incorrect.

1. The endorser is not liable except where the drawer has made default. *Lambert vs. Pack*, 1 *Salk.* 127. *Goodall vs. Dolley*, 1 *T. R.* 712, 713. The holder must have the note or bill with him at the time he makes the demand. *Chitty on Bills*, 287, *(note a.)* If the note cannot be given in evidence under the *first* count in the declaration, it cannot under the *second* count. *Carey vs. Gerrish*, 4 *Esp. Rep.* 9. *Chitty on Bills*, 379. The promise by the defendant was without consideration, because he was under no obligation to pay the note—no legal notice having been given to him. It was therefore a promise to pay the debt of another, and not binding, because not reduced to writing as required by the statute of frauds. *Wain vs. Warlters*, 5 *East*, 10. The promise was made by the defendant under an impression that he was bound to pay the debt. It was made, therefore, under a mistake. *Borradaile vs. Lowe*, 4 *Taunt.* 93. If there was a promise it was only conditional, which condition was not performed. *Goodall vs. Dolley*, 1 *T. R.* 713, 714. If the promise was effective, it only revived the note, and kept it still subject to every principle applicable to such notes. *Co. Litt.* 303. 1 *Chitty's Plead.* 248. There is no allowance stated in the declaration for the three days of grace. Months in reference to notes are calendar months. *Chitty on Bills*, 277. *Brown vs. Harraden*, 4 *T. R.* 148. A presentment of the note before the expiration of the three days of grace is void. 1 *Esp. Dig.* 262. *Rushton vs. Aspinall*, 2 *Doug.* 679. It is not pretended that any notice of nonpayment was given to the endorser, or that any demand was made on the drawer. This being the case, a promise to pay did not supersede the want of such notice and demand. *Phillips vs. M'Curdy*, 1 *Harr.* & *Johns.* 187. *Steele vs. French*, in the General Court at October term 1802. *Russell vs. Langstaffe*, 2 *Doug.* 515.

Taney, for the Defendants in error. The case of *Steele vs. French* was, that if the promise was made with ignorance of the facts, it did not bind the defendant. But it is insisted that ignorance of the law is no excuse. *Bilbie vs. Lumley*, 2 *East*, 469, 471. *Stevens vs. Lynch*, 12 *East*, 37. A promise to pay, under the circumstances of this case amounted to a waiver of notice. *Rogers vs. Stephens*, 2 *T. R.* 713. *Lundie vs. Robertson*, 7 *East*, 231. *Porter vs. Rayworth*, 13 *East*, 417. *Chitty on Bills*, 252, *(note g.)* *Gibbon vs. Coggon*, 2 *Camp.* 188. *Taylor vs. Jones*, *Ib.* 105. *Stevens vs. Lynch*, *Ib.* 332. *Wilkes vs. Jacks*, *Peake's Cas.* 202. *Hopley vs. Dufresne*, 15 *East*, 275. As to the declaration, the notice is sufficiently alleged. If the words under the *scilicet* were rejected, the averment would be sufficient. If the first count is bad, the second count is good. *Chitty on Bills*, 154, 375.

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Magruder, in reply, cited *Blessard vs. Hirst*, 2 *Burr.* 2670. *Farmer vs. Arundel*, 2 *W. Blk. Rep.* 824. 2 *Evans's Ess.* 14.

Curia adv. vult.

At this Term the Judges delivered their opinions *seriatim*.

MARTIN, J. This was an action on the case instituted by *Edward Thompson* and *Richard Maris*, in *Prince-George's* county court, to recover the amount due on a promissory note passed by *Samuel W. Beck* to *James Beck*, and endorsed by *James Beck* to the plaintiffs. The note was dated the 14th of March 1810, and was made payable 21 months after date. At the trial of the cause the plaintiffs offered evidence to prove the hand-writing of *Samuel W. Beck*, the drawer, and *James Beck*, the endorser, and that some days after the note became due, *James S. Morsell*, the agent of the plaintiffs, called on *James Beck* for payment of the same; that *James Beck* then informed the agent, he *(Beck,)* knew notice of nonpayment had not been properly given, that it had not been given for several days after the note became due, and that no demand had been made on *Samuel W. Beck*, the drawer; but that it was his intention to pay the note; that he was bound to pay his son's debts, but wanted time. That it was then agreed between the said agent, and *James Beck*, that *Beck* should give a deed of trust on his land as security for the payment of the money due on the note, and that further time should be given him for the payment. The deed of trust, however, was never executed; and no other evidence was offered by the plaintiffs relative to the demand of the amount of the note of the drawer, or of notice of nonpayment to the defendant. The counsel for the defendant prayed the instruction of the court to the jury, that the testimony in the cause was not sufficient to entitle the plaintiffs to a verdict; which instruction the court refused to give, being of opinion, and so directing the jury, that if they should find from the evidence that the note was endorsed by the defendant, and that he, having a knowledge that the drawer of the note had not been duly called on for payment, and that notice of the nonpayment had not in due time been communicated to the defendant, who in consequence thereof knew that in point of law he was not answerable for the note; yet if with this knowledge, they should find that he promised to pay the same as set forth, that the want of notice of the nonpayment by the drawer did not release him from the claim, and the same can be recovered in this action. It is now for the consideration of this court, whether the opinion and direction thus given to the jury were erroneous. The declaration in this case contains two counts, the *first* on the promissory note, the *second* for money lent and advanced. The *first* count is certainly erroneous, and the plaintiffs can take nothing under it. It states the de-

mand to have been made on the drawer for payment on the 14th day of December 1811, three days before the note became due, according to the established rules of law. It only remains to be considered if they were entitled to recover under the *second* count.

To make the endorser of a promissory note answerable to the holder, it is generally necessary that there should be a demand on the drawer, after the note becomes due, for payment, and a notice of nonpayment by him should be regularly given in due time to the endorser. But this is a privilege to the endorser. It is for his benefit alone, and he may either avail himself of this privilege, or waive it at his pleasure. If with a knowledge of the facts that no demand has been made on the drawer, and that notice of nonpayment has not been regularly given to him, he still acknowledges the note to be due, and promises to pay it, he waives the privilege given by law for his benefit, and is *quo ad hoc*, in the same situation as if the demand and notice had been regularly proved. If then the *first* count in the declaration had been correct, and the jury were satisfied from the evidence that the defendant did promise to pay the amount of the note, having at that time a knowledge of the facts that no legal demand had been made on the drawer for payment, or legal notice of his nonpayment given to the endorser, the plaintiffs might have recovered on that count, although no proof was offered of a demand on the drawer, or legal notice of his nonpayment to the endorser. If then the finding of these facts by the jury would have authorised a verdict in favour of the plaintiffs, on the *first* count, had it been correctly drawn, I think the authorities will justify the court in considering them sufficient to sustain the action on the *second* count. It is laid down by *Chitty on Bills of Exchange*, and the position supported by many other authorities, that it is not necessary to declare on a promissory note between the original parties to it, but that in an action for money lent, the same may be given in evidence; as in an action at the suit of a payee of a bill against the drawer, and in an action at the suit of a payee of a note against the maker, they being evidence of money lent by the payee to the drawer of the one, and the maker of the other. It is also proper in an action at the suit of the endorsee against his immediate endorser, and for this plain and evident reason, that in point of law the endorser of a promissory note, is to his immediate endorsee considered as the maker of a new note for a valuable consideration. I think the court did right in submitting the evidence to the jury, for them to ascertain if the defendant had made a promise to pay the note with a knowledge of the facts, that a legal demand had not been made on the drawer, and that notice of nonpayment had not been regularly given to him, and in their direction, to find a verdict for the plaintiffs, if these facts were proved to their satisfaction. I am therefore of opinion that the judgment of the court below be affirmed.

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Dorsey, J. The declaration in this case contains two counts. In the *first* it is averred that *Samuel W. Beck*, on the 14th of March 1810, made his promissory note in favour of the defendant, or order, for $1569 27, payable twenty-one months after date, and that the defendant endorsed the said note to the plaintiffs, who after the end and expiration of the said 21 months, that is to say, on the 14th of December 1811, shewed and presented the said note, with the endorsement thereon, to the said *Samuel W. Beck*, and requested payment thereof, but that he refused to pay the same, of which the defendant afterwards, to wit, on the day and year aforesaid, had notice. The *second* count is for money lent and advanced by the plaintiffs to the defendant. It appears by the bill of exceptions, among other things, that the plaintiffs never did demand of the maker the payment of the money due on the note, and the defendant, in a conversation with the plaintiffs' agent, after admitting this fact, and that notice of nonpayment had not been duly communicated to him, declared his intention to pay the amount of the note. The court below instructed the jury that they ought to find a verdict for the plaintiffs, if they should believe that the defendant promised to pay the amount of the note, under a knowledge of the following circumstances: *First*, that the maker was not in due time called on for payment. *Secondly*, that due notice of nonpayment was not given to the defendant; and *Thirdly*, that the laches of the plaintiffs had extinguished their claim against the defendant. To this opinion the counsel for the defendant excepted.

I am of opinion that the *first* count in the declaration is erroneous, and of course no recovery can be had thereon. The note stated in the record was not payable before the 17th of December 1811; until that time no demand of payment could be made; and as the demand of payment, and notice to the defendant of the nonpayment, are averred to have taken place at a time when the amount of the note was not demandable, the plaintiffs have failed to show any legal claim against the defendant. The authority of *Rushton vs. Aspinall*, *Douglass*, 679, is decisive on this point.

Let us examine the opinion of the court with reference to the *second* count. It has been established by a series of authorities, that it is not necessary to declare on a promissory note, but that the same may be given in evidence on a count for money lent and advanced; the statute of 3 and 4 *Anne*, *ch.* 9, which enables the holder to declare on the note, having been construed as conferring only an additional or cumulative remedy. But this doctrine does not apply to cases where there is no privity between the plaintiff and defendant, as between endorsee and drawer. *Chitty on Bills*, 376. *Buller's N. P.* 137. *Story vs. Atkins*, 2 *Strange*, 719. As there is a privity in this case between the plaintiffs, who are the endorsees, and the defendant, their immediate endorser, the former are entitled to recover under the money count, unless they have lost their remedy by their laches.

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It cannot be questioned that it is the duty of the holder of the note, if he wishes to have recourse to the endorser, to demand payment of the note when it becomes due, and to give notice of the nonpayment to the endorser. The law casts this obligation on the holder in order that the endorser may take the necessary measures to secure himself against loss; if the holder neglects to do this, the law presumes that the endorser is thereby prejudiced. The rule was adopted for the benefit and security of the endorser, and he may of course, if he thinks fit, waive the consequences of the holder's neglect; and it has been often decided that if an endorser, with the knowledge that the holder has not used due diligence in demanding payment of the maker, promise to pay the amount of the note, such promise shall amount to a waiver of the holder's irregularity. *Chitty on Bills*, 250. *Lundie vs. Robertson*, 7 *East*, 231.

This view of the case is not inconsistent with the doctrine established by the case of *Rushton vs. Aspinall*, reported in *Douglass*. That case proceeds on the ground that a plaintiff must in all cases state a sufficient cause of action in the declaration; and therefore, when the holder declares on a note in a suit against the endorser, he must state a regular demand on the maker for payment, and notice of the nonpayment to the endorser. But what shall be deemed sufficient evidence of those circumstances, or how far the endorser has dispensed with the necessity of their being proved, or has estopped himself from controverting the truth of those averments, are considerations entirely distinct from all questions of pleading.

I must dissent from so much of the opinion of the court below as declares that the promise of the defendant was not obligatory, unless he knew at the time that he was discharged from all liability by the laches of the plaintiffs. It is an established maxim in our law, equally applicable to civil and criminal cases, that *ignorantia legis non excusat*. A different principle would be introductive of much confusion and uncertainty. *Bilbie vs. Lumley*, 2 *East*, 471. *Doctor & Student*, 97, 79, 251. *Stevens vs. Lynch*, 12 *East*, 38. *Lundie vs. Robertson*, 7 *East*, 231. But as this part of the opinion, though erroneous, operated to the prejudice of the plaintiffs only, by increasing the burden of proof on their part, there can be no reason for reversing the judgment on an exception tendered by the defendant.

I am of opinion that the judgment of the county court ought to be affirmed.

Chase, Ch. J. In considering this case certain principles have been adverted to. The law is established, that to sustain a suit on a promissory note by the endorsee against the endorser, it is incumbent on the plaintiff to prove a demand by the endorsee of the maker of the note when due, and if not paid, notice of nonpayment to the endorser in due time. The judgment of the court below is grounded on the admis-

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sion that such demand was not made, and that such notice was not given; the court being of opinion, that the want of notice of nonpayment was supplied or waived by the promise of the defendant, if he had knowledge that such demand was not made nor notice given, and that he knew he was not answerable in point of law in consequence thereof; and if the jury should find such facts, that the action can be sustained.

The liability of the endorser of a promissory note is qualified or conditional, his engagement being to pay the money if the maker did not, and the endorser cannot be resorted to unless such demand is alleged and proved. The liability of the endorser to pay the money rests on proof of demand, and notice of nonpayment in due time, and his promise cannot amount to a waiver of proof of demand; because, not being legally liable to pay the money when the promise was made, his promise was made without consideration, and a *nudum pactum*, on which no action can be supported.

Upon recurrence to the proof in the case, it appears there was no evidence given which was legally sufficient to warrant the jury in finding a promise made by the defendant to pay the money to the plaintiffs, nor is there any evidence that he knew the legal consequences of the laches. It is only proof of a proposition for a compromise which was not effected. The defendant's saying that it was his intention to pay the note, and that he was bound to pay his son's debts, could not amount to a promise, nor create any obligation on the defendant to pay the money due on the note in question. Whatever might be the intention of the defendant, he was certainly mistaken in supposing he was bound to pay his son's debts. His intention to pay arose on his supposed liability to pay his son's debts.

Every endorsement is in the nature of a new bill of exchange for some purpose. There must be a demand on the person who undertakes to pay, and notice of nonpayment in due time; and between the endorsee, and his immediate endorser, there may be an inquiry into the consideration.

Admitting, for the sake of argument only, that on the common law count for money lent in this case the endorsement is *prima facie* evidence of money lent by the endorsee to the endorser, yet such presumption may be repelled and avoided by proof. The evidence adduced in this case shews that there was not any money lent. The common law count can derive no aid from the promissory note as a negotiable instrument, but the proof, which is applicable to it, must be such as will support it as an independent count. In this case there is no evidence to prove that there had been any money lent or any assumption, and if there was any assumption, it must have been for the debt of another—a debt due from his son to the plaintiffs—and not being in writing, is not binding on the defendant. At common law, and before the statute of *Anne*, a promissory note was a chose in action, and not assignable so as to enable the as-

signee to bring a suit in his own name; and the suit in this case cannot be supported without evidence of money lent by the endorsee to the endorser.

I am of opinion that the judgment of the court below is erroneous and ought to be reversed.

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JUDGMENT AFFIRMED.

MADDOX vs. THE STATE use of SWANN, *et al.*

DECEMBER.

APPEAL from *Saint Mary's* County Court. Debt brought on the 10th of February 1816, upon a testamentary bond executed in 1799, *(a)*, by *John Maddox*, as executor of *John Swann*, with the defendant, (now appellant,) as one of his sureties. The defendant pleaded general and special performance. To which there were replications of nonperformance, and setting forth that *John Swann* by his will, dated in September 1798, amongst other things did direct, that certain of his negro slaves should be sold, &c. and that the money arising from the sales of his negroes, and all the residue of his estate after his just debts were paid, to be equally divided between his brother *Justinian*, and his brother *George's* children; that *George Swann* had living at the death of the testator the following children, viz. *James*, *Mary*, *Sarah*, *Rebecca*, *Justinian* and *Elizabeth*, all of whom are now alive. That *Justinian Swann*, one of the legatees, died before this action was brought, and that *James Swann* is his administrator. That by virtue of the will the said *James*, *Mary*, *Sarah*, *Rebecca*, *Justinian*, and *Elizabeth*, and *Justinian* the elder, became each entitled to one seventh part of all the personal estate of the said *John Swann*, which remained after all legacies and charges, &c. were paid. That on the 11th of July 1799, there remained in the hands of the executor the sum of £399 3 4, of the goods and chattels of the deceased, to be paid and administered, &c. of which sum of money the said *James*, *Mary*, *Sarah*, *Rebecca*, *Justinian* and *Elizabeth*, and the said *James Swann*, as administrator of the said *Justinian*, at whose request the original writ in this case was impetrated, were each entitled to one seventh

L S by his will dated in September 1798, amongst other things bequeathed as follows: "As also it is my will and desire the money arising from the sales of the above mentioned negroes, and all the residue of my estate, after my just debts are paid, to be *equally divided* between my brother J S and my brother G S's children."—*Held*, that J S, the above legatee, took, as a tenant in common, an equal part, and no more, with each of the children of G S; and that if the executor paid over to him more than such equal part, believing him to be entitled to one half, such payment could not affect the claim of the children of G S, but that they were entitled to recover the same sum that they would have been entitled to recover, if J S had received only his own proportion

An action on the testamentary bond given to the state by the executor of L S, brought at the instance of the administrator of J S, and the six children of G S, the above legatee, it was objected that under the pleadings and issues in the cause, the state could not recover unless proof was produced that all the persons, for whose use the suit was brought, were alive at the trial—*Held*, that on the issues in the cause the jury could not find that any of those persons were dead, unless some proof of the death was produced to them, and that in the absence of the proof, the legal inference was that such persons were alive.

The court refused to direct the jury, that if they should not find that G S left six children, that then they should find for the defendant, but directed them, that if G S left six children at the death of the testator, the estate must, under the residuary clause in the will, be divided into seven equal parts; if only five into six equal parts.

A joint action may be maintained in the name of the state on a testamentary bond, at the instance of persons claiming under different rights, as legatees under the testator's will—as where one of the legatees had since died, his executor or administrator may be joined with the other legatees.

In order to take advantage of the act of limitations on a bond, as in all other cases, it must be pleaded

(a) As oyer of the bond was not made we cannot give exactly its true date.

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part, amounting to the sum of £57 0 5. Breaches, the nonpayment thereof, &c. There were special demurrers to the replications; and among other causes assigned was one that the replications alleged that *Justinian Swann* the elder, and the children of *George Swann*, six in number, were respectfully entitled to one seventh part of the personal estate remaining, &c. But that by the will the said *Justinian* was entitled to one half, &c. The demurrers were overruled by the county court, and they directed that all the causes of demurrer, except the above, be stricken out. The defendant then on motion, &c. withdrew his demurrers for the purpose of rejoining to the replications. In his rejoinder to the first replication, he stated that *Justinian Swann* was entitled to one clear half of the goods, &c. of the deceased, and that the executor paid unto the said *Justinian*, in his life-time, to wit, &c. the said clear half, &c. And that the children of *George Swann* were twelve in number, and are all now dead, and were entitled jointly to the other half; without this, that *Justinian* was entitled to one seventh part, &c. and that *James Swann*, his administrator, is now thereto entitled; and that *George Swann* left six children who are all now alive, &c. and entitled to one seventh part respectively, &c. To the second replication the defendant rejoined, that the executor made a full and perfect inventory, &c. and the same returned, &c. and that the executor did not sell the goods, &c. and convert to his own use, &c. Issues joined.

1. At the trial the plaintiff read in evidence the will of *John Swann*, dated in September 1798, wherein amongst other things is this bequest, viz. "As also it is my will and desire, that the moneys arising from the sales of the above mentioned negroes, and all the residue of my estate, after my just debts are paid, to be *equally divided* between my brother *Justinian*, and my brother *George's* children." The counsel for the plaintiff then prayed the opinion of the court to the jury, that *Justinian Swann*, one of the legatees in the will mentioned, took as a tenant in common an equal part and no more, with each of the children of *George Swann;* and that if the executor paid over to him more than such equal part, believing him to be entitled to one half, such payment could not affect the claim of the children of *George Swann*, but that they were entitled to recover the same sum that they would have been entitled to recover if *Justinian Swann* had received only his own proportion. This opinion the Court, [*Johnson* Ch. J. and *Plater*, A. J.] gave accordingly. The defendant excepted.

2. The defendant then prayed the opinion of the court to the jury, that upon the pleadings and issues in this cause, the state cannot recover unless proof satisfactory was produced to the jury that all the persons, for whose use the suit was brought, were alive at the trial of the

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cause. But the court refused to give the direction as prayed, but were of opinion, and so directed the jury, that on the issues in the cause they could not find that any of those persons were dead, except some proof of that fact was produced to them, and that in the absence of such proof the legal inference was that those persons were alive. The defendant excepted.

3. The plaintiff then produced a competent witness, who proved that he knew five children, who were reputed to be the children of *George Swann*, and one other child, who from a party to the cause, he understood was one of the children of *George Swann* named in the will of *John Swann*. The defendant then moved the court to instruct the jury, that if they should not find from the evidence that *George Swann* left six children, that then they should find for the defendant. This direction the court refused to give; but directed the jury, that if *George Swann* left six children at the death of the testator, that then the estate under the residuary clause in the will be divided into seven equal parts; if only five, into six equal parts. The defendant excepted. Verdict, that there remained in the hands of the executor, the sum of, &c. and that the six children of *George Swann* were each entitled to one sixth part thereof, &c. and that the executor had duly accounted for and paid to *Justinian Swann*, in his life-time, one seventh part of the said estate. Judgment on the verdict, and the defendant appealed to this court.

The cause was argued before CHASE, Ch. J. and BUCHANAN, MARTIN, and DORSEY, J.

Stone, for the Appellant. 1. The bond upon which this action is brought being above twelve years standing, it could not be given in evidence. Acts of Assembly 1715, *ch.* 23, § 6; and 1729, *ch.* 24, § 21. *Anon.* 1 *Salk.* 278. 4 *Bac. Ab.* tit. *Limitation of Actions*, 485, 467.

2. The parties for whose use the action is brought, claiming under different rights, could not be joined in the same action. 1 *Chitty's Plead.* 8, 22. *Buckley vs. Collier*, 1 *Salk.* 114. *Abbot vs. Blofield*, *Cro. Jac.* 644. *Bidgood vs. Way*, 2 *W. Blk. Rep.* 1236. *Birkley vs. Presgrave*, 1 *East*, 226; and 5 *Bac. Ab.* tit. *Release*, (G) 702.

Magruder, for the Appellee, was stopped by the court.

CHASE, Ch. J. It has been established, that in order to take advantage of the act of limitations it must be pleaded. The court concur with the court below in the opinions expressed in the several bills of exceptions.

JUDGMENT AFFIRMED.

1819. DECEMBER.

The State, use Millard & Waring, vs. Green.

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In an action on an administration bond, brought at the instance of M and W, to the plea of general performance, it was replied, that the intestate, in his life-time, was indebted to M and W in a certain sum of money for goods sold, &c. which he promised to pay, and that neither he, nor the administrator, although assets had come to his hands sufficient to pay all debts of the intestate, had paid, &c. The defendant's rejoinder was that the intestate did not assume, &c. on which issue was joined. He also rejoined the act of limitations, and tendered an issue. To this there was a general demurrer.—*Held*, that if the statute of *Ann* does not permit a defendant to rejoin a double defence to the breach assigned, in an action on a bond with a collateral condition, (and whether it does or not, *Quere*,) his doing so would only be duplicity in pleading, which can only be taken advantage of by special demurrer.

So if a rejoinder, &c tenders an issue instead of a verification, the objection to it must be assigned as a special cause of demurrer.

Appeal from *Charles* County Court. Debt, brought on the 28th of June 1813, on an administration bond, executed to the State on the 8th of March 1800, by *Henry Stewart*, as administrator *de bonis non* of *Joshua Stewart*, with *Leonard J. Ferrell*, and the defendant, (now appellee,) his sureties. The defendant pleaded general performance, to which there was a replication of nonperformance, and assigning as a breach, that on the 27th June 1799, the intestate was indebted to *Millard* and *Waring*, at whose instance and for whose use the action was brought, in the sum of £15 18 10, for goods, before that time sold and delivered, which he assumed and promised to pay, &c. and that neither the intestate in his life time, nor the administrator *de bonis non* since his death, had paid, &c. Averment that assets sufficient to pay, &c. came to the hands of the administrator *de bonis non*. The defendant rejoined *non assumpsit*. He also rejoined *the act of limitations*. To the first rejoinder issue was taken; and to the other there was a demurrer, and joinder in demurrer. The County Court overruled the demurrer; and the verdict on the issue in fact, and judgment being for the defendant, this appeal was prosecuted.

The cause was argued in this court before Buchanan, Earle, and Dorsey, J.

Magruder, for the Appellant. The only question is, whether or not the defendant below could rejoin two distinct matters to the replication. It is not within the statute of *Anne*. It is a departure from the plea of performance. *Warren vs. Ivie*, 2 *Stra.* 908. Besides, this rejoinder tenders an issue, instead of concluding with a verification.

Stonestreet, for the Appellee. 1. The replication gave the first notice of the cause of action, and therefore limitations could not be pleaded, except by way of rejoinder. 2. There was no *non est* on a *capias ad respondendum* against the administrator, or *nulla bona* on *fieri facias* returned before the action was brought; and therefore the plaintiff has shown no cause of action.

Dorsey, J. delivered the opinion of the court. This was an action brought on an administration bond for the use of *Millard* and *Waring*, against the defendant, who was one of the securities of *Henry Stewart*, the administrator of *Joshua Stewart*. The declaration is in the common form. The defendant pleaded performance. The State replied, that the intestate in his life-time being indebted to *Millard* and *Waring* in the sum of £15 18 10, for goods sold and delivered by them, promised to pay them that sum, and that neither the intestate, nor the administrator, al-

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though assets had come to his hands sufficient to pay all the debts of the intestate, had paid the said sum. The defendant rejoined that the intestate, in his life-time, did not assume in manner and form as the State had by replying alleged; on which issue was joined. The defendant then proceeds as follow: "And the said defendant, with leave of the court here first had and obtained, further saith, that the said State ought not, &c. because he saith that the said *Joshua* in his life-time did not, within three years next before the day of impetrating of the original writ in this cause, promise in manner and form as the said State had by replying alleged, and of this he puts himself upon the country." The State demurred to this second rejoinder. The defendant joined in demurrer, and the court below overruled the same.

Two objections have been urged by the appellant's counsel. *First*, That the defendant cannot, under the statute of *Anne*, rejoin double to a replication. *Secondly*, That the rejoinder in this case, if good in other respects, is defective, because it tenders an issue instead of concluding with a verification.

It is unnecessary for the court to decide in this case, whether a defendant, in an action on a bond with a collateral condition, can rejoin double to the replication assigning the breaches. Assuming for the sake of argument that the statute of *Anne* does not permit a defendant in such a case to rejoin a double defence to the breach assigned, the infirmity would consist in duplicity alone, which can only be taken advantage of by special demurrer. You must, according to the authorities, lay your finger on the defect. The objection to the want of verification is open to the same answer; it must be assigned as special cause of demurrer.

JUDGMENT AFFIRMED.

WICKS, *et al.* vs. CHEW, *et al.*

DECEMBER.

The chancellor has no authority to decree a deed of manumission to be recorded, where it has not been enrolled within the time prescribed by law.

APPEAL from the Court of Chancery. On the 11th of September 1816, *Araminta Chew*, and others, (the appellees,) by *John Davis* their next friend, filed a petition against the *heirs and devisees* of *Richard Darnall*, deceased, stating that the said *Darnall*, on the 10th of May 1805, executed and acknowledged a deed of manumission, whereby the petitioners were manumitted from slavery. That *Darnall* died soon after the execution of this deed, and that it has been omitted to be recorded within the time prescribed by law, without any fraudulent design or intention in any person whatever. *Prayer*, that such notice be given to the *heirs and devisees* of *Darnall* as may be necessary, and that the deed may be recorded by decree of the court of chancery. On this petition an order of publication issued against the *heirs and devisees* of *Darnall*. *John Wicks*,

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Henry Darnall, and *Henry Holland*, claiming to hold the petitioners in slavery, appeared and filed their petition, stating that the petition filed by *Chew* and others ought to be dismissed—1. Because the law of the land does not authorise slaves, either in person or by their next friend, to institute any proceedings in chancery. 2. Because the court has no power to decree that deeds of manumission be recorded after the expiration of the time within which the law directs them to be recorded. 3. Because the deed was never perfected by delivery, either to the petitioners, or to any person for their use, and *Darnall* was not bound in law to execute the same.

Kilty, Chancellor, (February 18th, 1817.) The act of assembly under which the publication is made, does not direct in what manner the defence, if any, in consequence of the notice, is to be conducted. In some of the objections by *Wicks* and others, facts are stated which do not appear by the petition filed by *Chew* and others; but being only alleged in the petition filed by *Wicks* and others, they cannot be taken to be true as in an answer. The parties may take measures for having the facts that may be thought material, before the court. *George Medkiff*, and *Dorothy* his wife, she being one of the heirs of *Richard Darnall*, appeared in February term 1817, and by their answer admitted the execution and acknowledgment of the deed of manumission, and that it was unrecorded until the 19th of May 1814; that the petitioners are slaves, and cannot bring any action in equity either by next friend or solicitor, or in person; that if the deed was decreed to be recorded, such decree would work a manifest injustice, as all the property which came to these respondents, and the other heirs and devisees of *Richard Darnall*, as the children of *Francis Darnall*, had been divided, and much the greater part of the petitioners have, on the division of the personal property, fallen to these respondents; that after the execution and acknowledgment of the deed of manumission, *Richard Darnall*, (as the respondents were informed and believed,) altered his mind with respect to the petitioners, and determined not to liberate them, which was the reason that he did not have the deed recorded in due time. That *Richard Darnall* died on the 25th of December 1807.

Kilty, Chancellor, (July Term 1817.) It is the first instance, I believe, of an application to record a deed of this kind, but I am nevertheless of opinion that it ought to be granted. It was made under the act of 1792, *ch.* 41, the course of proceeding under which was remarked on in the order of February 18th, 1817. No measures have been since taken for having the facts before the court, and the defence has been made on the construction of the law. The words of the act are general—"any deed to the validity of which recording is necessary." It speaks of land or other *thing* conveyed; and the original act on the same sub-

ject, (1785. *ch.* 72,) spoke of the *thing* or premises. The act of 1785 prescribes no time for the recording; that of 1792 adopts the time within which the deed ought to have been recorded. The act of 1796, *ch.* 67, directs that deeds of manumission shall be recorded within six months; though it is not so strong in its expressions as the act of 1715, *ch.* 47, which directs that no land, &c. shall pass by bargain and sale only, unless the deed be acknowledged and enrolled within six months. The recording, however, has been considered so necessary under the act of 1796, that after the six months, a claim to freedom under a deed could not be maintained without it. But I apprehend that the former slave would have a right to freedom from the delivery of the deed for nearly six months, the subject to be divested by his neglect to have it recorded within the limited time. It was urged that the deed of manumission conveyed nothing. But a right may be conveyed or granted as well as property, and the words of the act are that the person possessing a slave may, by writing, &c. grant him his freedom.

As to the right of the parties to bring this suit which has been questioned. I consider their possession of the deed to which they were parties, sufficient for such a suit, the next friend being answerable for costs. The grantor, *Richard Darnall*, gave them a power to perfect the deed by recording. They neglected to use that power. But if the law extends a remedy to any and every deed, it must allow the right of application for that remedy to any grantee therein named. Although the neglect to record the deed divested the right which might have been perfected by the grantee, it may be revived by the provision made for recording; as the right to maintain an action of ejectment might be lost and recovered. I lay out of the case the length of time between the date of the deed, and that of the petition for recording, and the allegation of the grantor altering his mind, of which there is no evidence; and it is then the ordinary case of a deed being unrecorded, without any fraudulent intention of the party claiming under it, which is indeed always presumed to be the case unless the contrary is made to appear.

It is the practice also on publication, to decree the recording of papers purporting to be deeds acknowledged, without requiring proof of the actual execution. The publication is certified to the court in the usual way.

The interest in the persons of the petitioners, considered as property, which is set up by some of the heirs, is not such as is provided for by the acts on the subject—*Decreed*, that the deed of manumission, filed with the petition, from *Richard Darnall* to negroes *Araminta*, &c. bearing date on the 10th of May 1805, be recorded or entered among the records of the county court of *Anne-Arundel* county, where the grantor *Richard Darnall* did reside; the said recording to be within six months from the 28th of July 1817, the date of this decree. Provided, &c. in the words of the

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fifth section of the act of 1792, *ch.* 41. From this decree the defendants appealed to this court.

The cause was argued before Buchanan, Earle, Johnson and Dorsey, J.

Magruder, *Stephen* and *Boyle*, for the Appellants, contended, 1. It is not alleged in the petition, nor does it appear, that the petitioners are under 45 years of age, and of healthy constitutions and capable by labour to procure sufficient food and raiment, &c. 2. Slaves cannot be petitioners in chancery by next friend or in person. 3. The court of chancery has no power to decree the recording of any instrument of manumission. 4. The original proceedings in chancery are erroneous, there being no persons named as defendants; and 5. An order of publication cannot go except against nonresidents, or persons alleged to be so. They referred to the acts of 1796, *ch.* 67, *s* 29; 1785, *ch.* 72, *s* 11; 1791, *ch.* 79; and 1792, *ch.* 41, *s* 3; and *Negro James vs. Gaither*, 2 *Harr. & Johns.* 176.

Brewer, for the Appellees.

Buchanan, J. delivered the opinion of the court. This case comes up on an appeal from a decree of the chancellor, ordering a paper executed by *Richard Darnall*, purporting to be a deed of manumission to the petitioners, to be recorded. By the act of 1796, *ch.* 67, *s.* 29, deeds of manumission are required to be recorded "within six months after the date," without which they are of no validity in law. The instrument of writing which is sought to be recorded, bears date the 10th of May, in the year 1805, and was recorded on the 19th of May 1814, something more than nine years after the date, and can have no effect or operation without the interposition of chancery. By the act of 1785, *ch.* 72, *s.* 11, "for enlarging the power of the high court of chancery," it is provided, "that in case any deed hath been or shall hereafter be executed, to the validity of which recording is necessary by law, and such deed hath not been, or shall not be recorded agreeably to law, without any fraudulent design or intention of the party claiming under such deed, that the chancellor shall have full power and authority, upon application of the party claiming under such deed, and summoning and hearing the party making such deed, his heir, devisee, executor or administrator, as the case may require, and being satisfied that the party claiming under such deed has a fair and equitable claim to *the premises* therein mentioned, to order and decree that such deed shall be recorded; and when such deed is recorded, it shall, in pursuance of such decree, be taken and considered in all courts of law and equity against the party making such deed, his heirs, devisees, executors and administrators, in the same state, and to have the same effects and consequences, to all intents

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and purposes, as if such deed had been recorded within the time prescribed by law; but such deed shall not destroy, or in any manner affect the title of any purchaser of the same *thing or premises*," &c. And by the supplement of 1792, *ch.* 41, *s.* 3, directing the mode of proceeding against nonresidents, it is enacted, "that in case any deed hath been, or hereafter shall be executed, to the validity of which deed recording is necessary, and such deed hath not been, or shall not be recorded agreeably to law, without any fraudulent intention of the party claiming under the same, the chancellor, upon petition of the party to whom the said deed was executed, or of his, her, or their legal representatives, or of any of them, claiming the *land*, or *other thing conveyed*, or *intended to be conveyed*, by such deed, and without the appearance or hearing of the defendant or defendants, shall have power to decree the recording of the said deed," &c. Upon these acts of assembly the proceedings in this case are founded; and the chancellor, in his decree, supposes his authority to order the paper in question to be recorded, to be derived from them. And the question now to be decided is, whether the chancellor has the power to order such a paper to be recorded? The acts of assembly referred to are not intended to give relief in cases which were before without remedy, but to give an additional remedy, by enabling a party acquiring equitable rights, under a deed not operative in law for want of recording, to perfect those rights, by applying to the chancellor to order the original instrument to be recorded, and thus to give it the effect which by law it would have had, if recorded in due time, instead of going into chancery to enforce a specific performance, or compel a conveyance. They are intended to give an accumulative remedy to persons able to contract, and who by deed acquire rights which equity will protect, with the power to prosecute those rights. But by the laws of this state, a negro, so long as he is a slave, can have no rights adverse to those of his master; he can neither sue, nor be sued, nor can he make any contract, or acquire any rights under a deed, which either a court of law or of equity can enforce. And as it is the recording of a deed of manumission within the time prescribed by law, which entitles him to his freedom, he continues a slave, and can acquire no rights under such an instrument, until it is so recorded, and consequently cannot go either into a court of law or equity for relief of any kind. And as the acts of assembly only authorise the recording of a deed, on the application of the party claiming under it, and on the chancellor being satisfied that such party has a fair and equitable claim *to the premises therein mentioned*, they must be understood to relate alone to deeds creating claims, and to persons capable of acquiring and of prosecuting such claims, and cannot be construed to embrace the case of a deed of manumission, by which no right or claim can be created until it is recorded, and the object of which, while

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he continues in a state of slavery, is incapable of suing either in a court of law or equity. A master may execute and acknowledge a deed of manumission, and afterwards destroy it, or keep it, and refuse to have it recorded, and the slave remains a slave without redress. Besides, the original act of 1785 speaks of the *thing or premises* mentioned in the deed, and the language of the supplement of 1792, is "the *land* or *thing* conveyed or intended to be conveyed," by which it is obvious that they only contemplate deeds having relation to *property*.

It is therefore the opinion of this court, that the chancellor has erred in his construction of the acts of assembly.

DECREE REVERSED.

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G W being appointed trustee of the person and estate of J. H, a lunatic, it was ordered by the chancellor, with the trustee's consent, that until further order he should use as his own the property, real and personal, of the lunatic, without accounting for the profits, he undertaking to account for and deliver the same, when called on by the chancellor's order, or in any other legal manner; and undertaking likewise to keep, lodge, clothe, and in every respect maintain the lunatic, comfortably and conformably to his rank, station, and the amount of his property——*Held*, that the expenses attending the birth and raising certain young negroes of the lunatic, as well as certain other charges appearing on the account exhibited by the trustee, and for which he claimed an allowance, are incidental to the trust and the possession of the property under it, and therefore cannot be allowed

Although certain proceedings in chancery are informal and irregular as to the admission of parties to defend a claim improperly exhibited by a trustee against the estate of a lunatic; yet, as the decree of the chancellor, allowing such claim, if unreversed, would be final and conclusive in its operation on those of the representatives of the deceased lunatic, that have become parties to it.—*Held*, that the appeal made by those representatives, from the chancellor's decree, be sustained, and that the decree be reversed.

APPEAL from the Court of Chancery. *Jonathan Hickman* having been regularly declared a lunatic, and *White*, the Appellee, appointed his trustee, the following order was passed on the 28th of October 1802, by

HANSON, Chancellor. *Gowan White*, trustee of *Jonathan Hickman*, a lunatic, having filed his bond, and returned an inventory, list or schedule, as by the chancellor directed, is with the said trustee's contents, ordered, that until further order he the said *Gowan White* shall use as his own the property, real and personal, of the said *Hickman*, without accounting for the profits, the said *White* undertaking to account for and deliver the same when called on by the chancellor's order, or in any other legal manner; and undertaking likewise to keep, lodge, clothe, and in every respect maintain, the said lunatic, comfortably and conformably to his rank, station, and the amount of his property.

On the death of the lunatic, which happened on the 21st of December 1815, the trustee in passing his final account charged, among other things, for the raising of sundry negro children belonging to the estate of the lunatic, and which were born after his trusteeship, and also for the midwife's fees. *Jonathan Moore*, and others, (the appellants,) on the 19th of February 1816, filed objections against the said account, alleging that there are negro men to hire out to the amount of $400 at least, and negroes enough left to cultivate the land. The chancellor referred the case to the auditor to report thereon. The auditor by his report allowed the above charges; and the chancellor, on the 17th of December 1816, ordered that the report of the auditor be heard at the ensuing term, provided a copy of this or-

der was served on *Jonathan Moore*, (one of the persons who have objected,) before the 1st of February next. 1819.

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KILTY, Chancellor, (March 8th, 1817.) It appears that a copy of the order of the 17th of December last, has been served on *Jonathan Moore*, as therein directed, and no exceptions have since been filed to the report. The order passed by the late chancellor in 1802, was conformable to the established principle of committing the care and comfort of the lunatic, in preference to the interest of those who might be his representatives. This order would prevent an allowance for the possible hire of negroes, mentioned in the objections filed on the 19th of February 1816, if there was evidence to support such a charge. There are some cases in which the increase of negroes is considered as the profits. But whether the trustee could claim them or not, their maintenance has occasioned an extraordinary expense not necessary for the support of the lunatic, by which the estate is so far benefited. The other charges also were unconnected with the support of the lunatic. The account amounting to $1272 60 is allowed.

Moore, by his petition filed on the 10th of March 1817, stated that he was unavoidably prevented from attending earlier to except to the account of the trustee, and that he was prepared to prove, by legal and competent evidence, the injustice and unreasonableness of said account. That he is prepared to prove that the lunatic was not maintained and supported according to his property and station in life, but on the contrary, in a very uncomfortable manner. That the trustee ought not to be credited with the support and maintenance of the negroes born subsequent to the commencement of the trust, because he is able to prove that they were maintained by the hire of their respective mothers. On behalf of himself, and of the other representatives of *Jonathan Hickman*, he prayed the chancellor to open the order passed upon the report of the auditor, &c.

The chancellor on the 10th of March 1817, opened his order of the 8th instant, and ordered that depositions be taken on notice, &c. Under this last order sundry depositions, and other papers, were filed by the parties. By an inventory returned to the orphans court on the 13th of February 1816, by *White*, as the administrator of *Hickman*, the personal estate was appraised to $7838 95, including fifteen negroes born during the time *White* was the trustee of *Hickman*, appraised to $1640. The lands of the lunatic, as found by the inquisition of the jury, they declared to be of the yearly value of £40.

KILTY, Chancellor, (July Term 1817.) On considering the depositions filed, I do not see any reason to alter the determination made in March last. The paying for the raising of the young children by the hire of their mothers, is in effect the same as a payment in money, their labour

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or hire being thereby withdrawn from the trustee. The complaint of want of care and attention to the lunatic, is not supported on weighing the whole of the testimony, and seems also irrelevant to the present object. The petition is therefore dismissed with costs, and the account stated by the auditor is again allowed. From this order *Moore* and others appealed to this court.

The case was argued before EARLE, JOHNSON, and DORSEY, J.

Boyle, for the Appellants, stated that the only question was, whether the trustee of the lunatic should be allowed for raising the slaves, born after he was appointed, as the estate was sufficient to maintain them, and did maintain them? He contended, that under the order of chancellor of the 28th of October 1802, the trustee took the real and personal estate of the lunatic, under the express condition that he was to support the lunatic, and that he was bound to raise and maintain the negroes to be born, and to be at all the expenses in consideration of the profits and advantages to be derived from the estate. Upon this condition he accepted the trust.

Magruder, for the Appellee, contended, that the trustee was to support the lunatic out of the profits of the estate, but that he was not bound to raise and maintain the young slaves. He also contended, that no appeal would lie in this case; that it was not known who *Jonathan Moore*, and others, were, or that they had any right to object to the claim of the trustee. If they had a right, they should have filed their bill, calling upon *White* to account, who would set up the allowance made to him, and then the question would come properly before the court, whether the chancellor should have made the allowance or not. It is not regular to appeal from an order of the chancellor, making an allowance to a trustee.

Stephen, in reply, to show that the appeal would lie, referred to the act of 1785, *ch.* 72, s. 27.

EARLE, J. delivered the judgment of the court. From the proceedings it appears that the estate of the lunatic was amply sufficient for his support. Of this the trustee must have been sensible when he consented to the order of the chancellor of the 28th of October 1802, the plain meaning of which is, that the trustee should use the property of the lunatic as his own, without being held to account for the profits of it, and should keep and provide for the lunatic in a manner suitable to his situation in life, paying all incidental expenses, and looking to the clear profits for compensation for his care and trouble. The court consider the expenses attending the birth and raising the young negroes of the lunatic, as well as the other charges appearing on the ac-

count exhibited by the trustee, as incidental to the trust, and the possession of the property under it, and are therefore of opinion, that the chancellor misjudged in confirming the report of the auditor which allowed those charges.

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The proceedings in chancery in this cause are informal and irregular, but it appears to the court, that the chancellor's decree, unreversed, would be final and conclusive in its operation, on those of the representatives of the deceased lunatic that have become parties to it.

The court therefore decide, that the decree of the court of chancery be reversed, with costs to the appellants, in this court and in the court of chancery.

DECREE REVERSED.

DORSEY, *et al.* vs. CLARKE, *et al.* DECEMBER.

APPEAL from the Court of Chancery. On the 12th of March 1814, *Benjamin D. Clarke*, and *Sarah* his wife, and *Robert Yieldhall*, filed a petition against the children and heirs at law of *Richard Dorsey*, stating that *Joshua Yieldhall*, being seized in fee of a tract of land called *Norwood's Fancy*, died intestate, and without issue, leaving *Benjamin*, *Elizabeth*, *Sarah*, and *Robert Yieldhall*, his brothers and sisters, his heirs at law; that *Elizabeth* intermarried with *Stephen Joyce*, and is since dead, leaving no issue, and that *Benjamin Yieldhall* is also since dead intestate, and without issue, whereby their shares in the said land devolved upon the remaining heirs. That *Sarah* intermarried with *Benjamin D. Clarke*. That *Clarke*, and his wife *Sarah*, and *Robert Yieldhall* were the petitioners. That the said tract of land has not yet been divided between the representatives above named, although now of age; for that *Benjamin Yieldhall*, the eldest of the co heirs, being indebted to *Vachel Robinson*, and judgment being rendered against him in *Anne Arundel* county court, his undivided share in the said land was sold, to satisfy the same, by the sheriff, in virtue of a writ of *fieri facias*, and was purchased by *Richard Dorsey*, and a conveyance thereof made to him by the sheriff. That *Richard Dorsey* is since dead, leaving the following children his heirs at law, viz. *Caleb*, *Richard*, *Edward*, *Mary* and *Anne*, all infants. *Prayer*, for a division of the land, &c. The petitioners afterwards obtained leave to amend their petition, by adding that when *Richard Dorsey* became the purchaser of *Benjamin Yieldhall's* interest in *Norwood's Fancy*, at the sheriff's sale, and received the sheriff's deed for the same, it was expressly stated to him, and agreed by and between *Richard Dorsey* and *Benjamin Yieldhall*, that the land was only to be held by *Dorsey*, as security for the money advanced by

If a man purchases an estate, and pays the purchase money, but takes the deed in the name of another, a trust results by construction of law to himself; and if the nominal purchaser refuses to execute a declaration of trust, the payment of the consideration may be proved by parol as before the statute of frauds and perjuries. The payment of the money is the foundation of the trust.

Where the evidence was that D informed the witness that he had bought a tract of land to benefit Y, and if Y would pay him the purchase money with interest, he would convey to him the land—*Held*, that this evidence, if considered as proving an agreement between Y and D, could only operate to set up a trust on the foundation of a special contract between the parties: and that to permit such a trust to be proved by parol, would subvert the statute of frauds and perjuries.

If a man employs an agent, by parol, to buy an estate, who buys it accordingly, and no part of the consideration is paid by the principal, and there is no written agreement between the parties, he cannot, since the statute of frauds, compel the agent to convey the estate to him

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Dorsey, and that he would reconvey the same at any time upon the payment of the money so advanced, and the interest arising thereon. That *Dorsey*, in his life-time, never pretended to hold the land in any other way than as security for the money so paid, and the interest, but always promised and agreed to reconvey it when the money should be paid, and that he received from *Yieldhall*, in his life-time, payment of the interest on the money so advanced for *Yieldhall*. That *Richard Dorsey* made and executed his last will and testament, making his wife *Anne* his executrix, who took upon herself the execution thereof, and hath since intermarried with *Thomas H. Dorsey*. *Prayer* for a reconveyance to the petitioners of the interest of *Benjamin Yieldhall*, upon the payment of the money so advanced and the interest thereon, or that the same be sold for the payment of the same; and that *subpena* be directed to the original defendants, and *Thomas H. Dorsey* and *Anne* his wife, &c. The answers of the infant defendants, by their guardian for that purpose appointed, and the answers of *Thomas H. Dorsey*, and *Anne* his wife, state that they have no knowledge of the transaction in the petition mentioned; and in answer to one of the interrogatories propounded by the petition, "Whether it does not appear from the books of the said *Richard Dorsey* that the said sum of money was loaned, and the land held as security, and the interest received by him?" they state, that it appears from the books of *Richard Dorsey*, that the said *Benjamin Yieldhall* was annually charged with the rent of the land mentioned in the petition, but what was the amount of his interest therein, or the terms of sale, they are utterly ignorant, except as far as the same may be shown from said entries. They believe that *Benjamin Yieldhall* continued in possession during his life.

Kilty, Chancellor, (July term 1815,) Decreed, that there be a partition of *Norwood's Fancy*. For which purpose a commission issued to three commissioners, directing them to make a plat of the land, and to separate the same into three equal parts, equal as may be in quantity and quality, &c. Such plat was made and the land divided into three parts or lots, numbered 1, 2, 3, and so returned by the commissioners.

Kilty, Chancellor, (December term 1815.) Decreed, that the return of the commissioners, and the division made by them, be ratified and confirmed. Also decreed, that *Benjamin D. Clarke* and *Sarah* his wife, in right of his wife, shall hold in severalty lot No. 3; that *Robert Yieldhall* shall hold in severalty lot No. 2; and that *Caleb*, *Richard*, *Edward*, *Mary*, and *Anne Dorsey*, shall hold in severalty lot No. 1. The defendants afterwards, by motion in open court, prayed the chancellor to open the decree, and they filed a deed from *Stephen Joyce*, and *Elizabeth* his wife, to *Benjamin Yieldhall*, dated the 15th of August

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1801, "for all that undivided fourth part of the half part of *Norwood's Fancy*, now in the tenure and occupation of the said *Benjamin Yieldhall.*" Also a deed from *Joseph M'Ceney*, sheriff of *Anne-Arundel* county, to *Richard Dorsey*, dated the 12th of March 1807, stating a writ of *fieri facias* sued out of *Anne-Arundel* county court on the 30th of December 1806, on a judgment recovered therein by *Thomas Robinson* against *Singleton Warfield* and *Benjamin Yieldhall*, that the said *fieri facias* was laid upon an undivided part of a tract of land called *Norwood's Fancy*, being all the right, &c. which *Benjamin Yieldhall* had therein; and that after notice the said sheriff did, on the 9th of March 1807, expose the same to public sale, and the said *Richard Dorsey* became the highest bidder, and purchaser thereof, for the sum of $203 63, &c.

KILTY, Chancellor. The motion on behalf of the defendants to open the decree, has been considered. It being during the same term, the decree might certainly be opened, if a settlement of the matter in dispute could thereby be effected, more especially as the exceptions of the defendants to a ratification of the return and decision of the commissioners, alleging that they were entitled to a moiety of the said land, were mislaid, and not before the court. But the return and decision of the commissioners was not liable to exceptions on the face of the proceedings, the division being made pursuant to the decree and the commission. The decree was passed at July term 1815, and would be still in force even if the return was not ratified. It is therefore incumbent on the defendants to take measures for having that decree reviewed, inasmuch as the knowledge of the interest of *Benjamin Yieldhall* was within their reach, or that of their guardian.

The defendants afterwards, on the 26th of February 1816, filed their bill of review, (the infant defendants by their next friend,) stating the proceedings herein before mentioned, and alleging that the decree passed on the 22d of July 1815, is erroneous in point of law, in this that there was no legal proof before the court to show the extent of the interest of the respective parties in the land to be divided, the answer of the minor defendants, by their guardian, not being admissible evidence to affect their rights, the answer in reality being the answer of the guardian, who is sworn to it, and not the minors. Because the answers do not admit the nature and extent of the petitioners' interest, but refer them to proof to ascertain and make it out to the satisfaction of the court. Because no laches or negligence is imputable to the minor defendants for not stating the real nature of their interest in the land divided. Because a commission or some other mode of taking testimony ought to have been adopted before decree for partition passed. Because new evidence, material and relevant, has been discovered since the said

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decrees of July and December 1815, passed in this cause; that is to say, the said deed from *Joyce*, and wife, to the said *Benjamin Yieldhall*, and the deed from *Joseph M'Ceney* to *Richard Dorsey*. Because the heirs of *Richard Dorsey* were entitled to a moiety or one half of the land so as aforesaid divided, instead of one third allotted to them. *Prayer* for a subpena to *Benjamin D. Clarke* and *Robert Yieldhall*, and for *Benjamin*, *Elizabeth*, *Sarah*, *Anne*, *Gabriel* and *Delila Jane Clarke*, minors, under the age of 21 years, and children and heirs at law of *Sarah Clarke*, deceased, wife of the said *Benjamin D. Clarke*, &c. And that the said decrees be reviewed and reversed; and that there be granted to the heirs at law of *Richard Dorsey* of one moiety of the land so as aforesaid divided; and for general relief. The answers of the infant children of *Clarke*, by their guardian, state that they have no knowledge of the facts in the bill of review. *Clarke* by his answer states, that while the proceedings were depending, and before any decree was had therein, he and his wife *Sarah*, on the third of October 1814, by deed duly executed, &c. conveyed to *Robert Yieldhall* all their right, &c. in and to the said land. *R. Yieldhall* in his answer admitted the deed from *Joyce* and wife to *B. Yieldhall*, of which he was not apprised, and consequently that one half of the land passed to *Dorsey* by the sheriff's deed. That the purchase was made by *Dorsey* for the benefit of *B. Yieldhall*, who always held and used the same to the time of his death, and that the land has been ever since held by his representatives. That *Dorsey* on his death-bed told this defendant that the money paid by him for the land, with interest, was all he claimed, and that he would release it when the same was paid, at the same time requesting the defendant to tell *B. Yieldhall* to come to him, that a settlement might take place between them, while he was still living. That he can prove that *Dorsey* held the land only as security for the money, which he paid to the sheriff, and never claimed any other title to the same. A commission issued by consent to take testimony. On the petition and prayer of *R. Yieldhall*, the chancellor passed an order that *Thomas H. Dorsey*, one of the complainants in the bill of review, and *Benjamin D. Clarke*, one of the defendants, be examined as witnesses, saving all just exceptions. Testimony was taken and returned. *Benjamin D. Clarke* deposed, that *Richard Dorsey* sent for him, and told him that he had bought the land of *B. Yieldhall* at the sheriff's sale, in order to befriend him, that he wished to see *Yieldhall*, that he would give him up all the deeds for the land as soon as *Yieldhall* should repay him the purchase money, with interest thereon; and he wished *Yieldhall* to come and live with him for one year, that he should be allowed a fair price for his labour, and for various articles of personal property of said *Yieldhall*, bought by *Dorsey* at the time of the purchase of the land; and by this means *Yieldhall* would, at the end of the year, have more than discharged the whole of the debt.

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That *Dorsey* told the witness he had bought at the sheriff's sale of *Yieldhall's* personal property, sundry articles, which he enumerated, believed by the witness to be worth upwards of $143, and which *Dorsey* said he would keep and allow *Yieldhall* a fair price for them in part payment of the purchase money for the land. *Robert Welch*, of *Ben.* deposed, that he acted as deputy sheriff at the sale of *B. Yieldhall's* property, real and personal, under a writ of *fieri facias*, and that *Richard Dorsey* purchased the whole. That there did seem to be a perfect understanding between *Dorsey* and *Yieldhall* relative to the sale, and that *Yieldhall* informed the witness that *Dorsey* was his friend. The following *entries*, taken from the books of *Richard Dorsey*, in his own hand-writing, were admitted in evidence. "1807, March 9th. Cash paid to sheriff, and other expenses on *Benjamin Yieldhall's* property, bought by me $316

To one year's rent due and ending 9th of March 1808,	£7 2 2¼	
1808, May 6th. By cash,	3 15 0	
June 4th. By cash,	3 15 0."	

Kilty, Chancellor, (July term 1817.) On examining the proceedings, and considering the arguments of the counsel for *Dorsey*, I am of opinion that the moiety of the land is subject to be redeemed on payment of the principal and interest due. This opinion is formed on the whole testimony. The entry by *Richard Dorsey* of the rent, is not only for an unusual sum, but commences it at an unusual time; and his charging it as rent, was a necessary consequence of his keeping the title of the land in him as his security. As to the form of the proceedings, a reason is given by *R. Yieldhall* in his answer to the bill of review for consenting to a division. That reason ceases by the discovery of a greater interest in the land in *Dorsey's* heirs; and as the decree is liable to be reversed on the bill of review, the case is open for a division on the testimony since produced. According to what is stated in the conclusion of the abstract, the decree (after reversing the former one,) will be for a sale, the proceeds to be applied under the order of the court—*Decreed*, that the decree in the former case in December 1815, for partition, be reversed and set aside, and that the land in the proceedings mentioned be sold, &c. the trustee to bring into court the money arising from the sale, to be applied under the chancellor's direction, &c. From this decree the complainants in the bill of review appealed to this court.

The cause was argued before Earle, Johnson, and Dorsey, J.

Stephen, for the Appellants, contended, 1. That parol evidence was not admissible to prove that *Dorsey* purchas-

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ed the land for the benefit of *Fieldhall*. If *Fieldhall* had paid the money, then it would be a resulting trust, and parol evidence would be admissible to prove it. But here *Dorsey* bought the land and paid for it with his own money.

2. That if parol evidence was admissible, the testimony adduced was not sufficient to prove that *Dorsey* purchased for *Fieldhall's* benefit, if it were admissible evidence; but *Clarke* was an incompetent witness. He had been a complainant, and after filing the bill he conveyed away his interest. He is still answerable for costs.

Upon the *first* point he referred to *Willis vs. Willis*, 2 *Atk.* 71. *Lloyd vs. Spillett*, *Ibid* 150. *Gascoigne vs. Theving*, 1 *Vern*, 366, 367. *Botsford vs. Burr*, 2 *Johns. Chan. Rep.* 405. *Boyd vs. M'Lean*, 1 *Johns. Chan. Rep.* 582.

Murray, and *Brewer*, Jr. for the Appellees, on the *first* point referred to *Pow. on Cont.* 292, 296. 297, 298, 302. 305, 308, 426, 428. 5 *Vin. Ab.* 522. 2 *Eq. Ca. Ab.* 48, pl. 16. 1 *Phil. Evid.* 450, 457. *Foxcroft vs. Lister*, 2 *Vern.* 456. *Davis vs. Walsh*, 1 *Harr. & Johns.* 329. 2 *Madd. Chan.* 98. 2 *Eq. Ca. Ab.* 745. *Lane vs. Dighton*, *Ambl.* 409. *Ryall vs. Ryall*, *Ibid* 413; and *Lench vs. Lench*, 10 *Ves.* 511.

Dorsey, J. delivered the opinion of the Court. The statute of frauds and perjuries enacts that all declarations and creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will and testament, or else they shall be utterly void and of none effect; provided that where any conveyance shall be made by which a trust or confidence shall or may arise or result, by the implication or construction of law, such confidence or trust shall be of the like force and effect, as the same would have been if the statute had not been made.

Can the decree appealed from be sustained on the ground of a trust resulting in favour of the complainants by construction of law?

If a man purchases an estate, and pays the money, but takes the deed in the name of another, a trust results by construction of law to the man who paid the money; and if the nominal purchaser refuses to execute a declaration of trust, the payment of the consideration money may be proved by parol, as before the statute. The payment of the money is the foundation of the trust. *Bartlett vs. Pickersgill*, cited in *note* to 4 *East*, 577. *Willis vs. Willis*, 2 *Atk.* 71. *Lloyd vs. Spillett*, *Ibid* 150.

The counsel for the appellees have contended, that a resulting trust in this case is established, not only by the testimony of *Clarke*, but by the entries from the books of *Richard Dorsey*. The witness proves that *Dorsey* informed him that he had bought the land to benefit *Fieldhall*, and

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if *Yieldhall* would pay him the purchase money, with interest, he would convey to him the land. Taking this evidence in its utmost latitude, by considering it as proving an agreement between *Yieldhall* and *Dorsey*, it could only operate to set up a trust on the foundation of a special contract between the parties; and to permit such a conventional trust to be proved by parol, would subvert the statute of frauds and perjuries.

Where a man employs an agent by parol, to buy an estate, who buys it accordingly, and no part of the consideration is paid by the principal, and there is no written agreement between the parties, he cannot compel the agent to convey the estate to him, as that would be in the teeth of the statute. *Bartlett vs. Pickersgill.* Neither do the entries from the books of *Dorsey* establish the facts that the purchase money was loaned by *Dorsey* to *Yieldhall*. *Yieldhall* is not made debtor for the same, and the entries are such as any purchaser might make with a view of showing his disbursements, and the state of his property. And if the charge of rent in the entry is referable to *Yieldhall*, it establishes the relation of landlord and tenant between *Dorsey* and him, which is inconsistent with the existence of a resulting trust in favour of the complainants. It may be further remarked, that the construction put upon this entry by the counsel for the appellees, is at variance with their other proof in the cause, we mean the evidence of *Clarke*, which proves, if it proves any thing, a conventional trust. We hold, therefore, that these entries do not plainly indicate that the purchase money was paid by *Yieldhall*; and the authorities are clear that the payment of the money by the *cestui que trust* must be clearly proved, otherwise you render insecure titles depending on deeds and other written documents. *Willis vs. Willis*, 2 *Atk.* 70. *Lench vs. Lench*, 10 *Ves.* 517.

The next question is, was there any agreement between *Dorsey* and *Yieldhall* that the former should convey his interest in *Norwood's Fancy* to the latter, on the payment of the money, (and interest,) which *Dorsey* paid for the same; and was the agreement partly executed so as to take the case out of the statute? Whether the liberal offer of *Dorsey*, as detailed in the testimony of *Clarke*, was accepted by *Yieldhall*, so as to constitute a contract between the parties, does not appear in proof. If such a contract was proved, and *Yieldhall* put in possession of the land *in execution of the agreement*, we should not call in question the authority of a court of chancery to enforce it. It has been urged that the possession of the land by *Yieldhall* sufficiently proves the case. We do not think so. The bill does not charge that *Yieldhall* was in the possession under the agreement, though in its interrogating part it calls on the defendants to answer, whether *Dorsey* ever dispossessed *Yieldhall* of the land, and whether *Yieldhall* did not remain in quiet and uninterrupted possession of the same? The defendants, who were of age, answer that they know

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nothing of the transaction mentioned in the bill, or the circumstances connected with it, but that it appears from the books of *Dorsey* that he annually charged *Fieldhall* with rent. If the answer should be considered as impliedly admitting that *Fieldhall* was in possession of the land, it refers such possession to a contract essentially different from an agreement to convey.

Upon the whole it is the opinion of a majority of the court, that the decree of the chancellor be reversed.

JOHNSON, J. dissented.

DECREE REVERSED.

DECEMBER.

A carried N to J, and passed him off to B for a friend of his residing in *W*, (a few miles distant,) and thereby induced B to sell to them certain slaves for a less price than they were worth, with an understanding that they were to be kept by A and N in the neighborhood; whereas the slaves were intended for N, who was a dealer in slaves, and who removed those so purchased of B out of the state into the state of *South Carolina*. In an action brought by B against A to recover damages for the fraud and deceit—*Held*, that the objection that the agreement is a special verbal promise to answer for the default of another person, and void under the statute of frauds, could not be sustained: but that it was a cheat and fraud on the part of A for which B was entitled to damages.

ADAMS VS. ANDERSON.

APPEAL from *Montgomery* County Court. This was a special action on the case to recover damages, for fraud, deceit and misrepresentation, whereby the plaintiff, (now appellee,) was induced to sell certain slaves for a less price than they were worth. The defendant, (the appellant,) pleaded not guilty. At the trial the plaintiff offered evidence to prove, that some time in the spring of 1816, the defendant came to his house, bringing with him a stranger, (who he afterwards understood was named *Nixon*,) and the defendant applied to the plaintiff to know if he had not a negro woman to sell, stating that he wished to purchase. The plaintiff then asked the defendant if he wanted the woman for his own use, (the defendant being proved to be living at *Montgomery* court house, and about a mile from the plaintiff's residence,) the defendant replied that he did. Upon seeing a woman, the defendant asked the price, and the plaintiff said $300, which the defendant said he thought too high. The plaintiff then said he had another, with a child about six years old, which he would show him, and would sell for $400. Upon seeing them the defendant asked if he would sell them all three, and what would be his price. The plaintiff replied $700, and upon the defendant's objecting to the price, the plaintiff said as the defendant would take them for his own use, and the negroes were willing to go with him for that purpose, (the negroes having expressed their willingness,) he would sell them lower on that account, and would take $675. The defendant then said that the person present was a friend of his, residing in *Washington* city, and wanted one of them for his own use, and that he would take one, and himself the other, (as he wanted but one,) at that price. That *Nixon* then offered to give his bond, obliging himself to keep the woman for his own use, and from being removed from the city of *Washington*, where he lived. The plaintiff replied that a bond was not necessary, but that if the defendant would be responsible, and engage to that effect, he would be satisfied.

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That he abhorred the practice of selling to slave-dealers, and would not so sell the negroes for any consideration, nor dispose of them except with the understanding that they were to be kept in the neighbourhood. The defendant then declared that he did so engage, and that he would keep the one, and *Nixon* the others. Upon this the bargain was made, the money paid, and the negroes delivered to the defendant the next morning. The plaintiff then proved that this *Nixon* was at this time a slave-dealer from *South Carolina*, where he resided, and was known to the defendant to be so. That upon the delivery of the negroes to the defendant, they were all immediately carried off out of the state by *Nixon*, and removed to *Carolina*. He further proved, that shortly afterwards the defendant acknowledged that he had carried *Nixon* to the plaintiff, and passed him off on the plaintiff for a friend of his in *Washington*, and had induced the plaintiff to sell the said negroes to him, under the understanding that they were to be kept by him and *Nixon* in the neighbourhood, and boasted of the manner he had managed the affair for *Nixon*, whose agent he was, and from whom he had received $40 for his agency; that when they saw the negroes, *Nixon* fixed a price on them, and told the defendant that he might get them as much lower as he could, and he would allow him the difference. It was further proved by the plaintiff that these negroes, (one of them about 16 and the other 20 years old,) were born and raised in his family, and one of them had a father and mother belonging to him, and then in his service. And the plaintiff further proved, that a few days after the sale he called on the defendant, and reproaching him for his conduct, said he would return the money, and demanded the negroes, which the defendant said the plaintiff might get, but they had been then removed from the city of *Washington*. That the father and mother of the girl so sold, when they heard she had been carried off, were in great distress and trouble, and for sometime unable to do their usual work in the plaintiff's service, though they were not confined by sickness. On this evidence the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover. But the Court, [*Ridgely*, A. J.] refused to give the instruction. The defendant excepted; and the verdict and judgment being against him, he appealed to this court.

The cause was argued before Buchanan, Earle, Johnson, and Dorsey, J. by

Boyle, for the Appellant; and by
Magruder, for the Appellee.

Buchanan, J. delivered the opinion of the court. It is objected that the agreement in this case is a special verbal promise to answer for the default of another person, and void under the statute of frauds. In the opinion of the

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court it is clearly not such an undertaking, but is a palpable cheat and fraud on the part of the appellant, for which the appellee is entitled to damages.

JUDGMENT AFFIRMED.

DECEMBER.

CHAPPELL & STANSBURY vs. WYSHAM.

In 1812. (during the war between the U S and G B) C and S shipped a parcel of flour on bord of a vessel, ona voyage from *Baimore* to *Lisbon*, to be sold for them by W, the captain. The vessel was captured by a *British* ship of war, and carried to *Jamaica*, where the goods in question, the property of C and S, were restored to W as his private adventure, who obtained the money for which the goods were sold, and to recover which C and S brought an action of *assumpsit* against W To defeat the claim W offered to prove that the vessel was owned by B and freighted from him by W and S, who obtained a *British* license to protect the ship and cargo—*Held*, that as between the parties to an illegal transaction, no suit will lie by one against the other; and if the plaintiffs did know that the vessel was covered by a *British* licence, they would be so far considered parties to an illegal transaction, as to be incapable of sustaining this action; otherwise, if they had no knowledge of the fact.

The doctrine of constructive knowledge, on which prize courts have condemned the property of innocent claimants, is one of policy, and adopted for the purpose of preventing illicit trade, violation of allegiance, &c. But as between a principal and his agent, where the latter seeks to shelter himself behind his own illegal act, the same reason does not hold, and the law will not, on the principle of constructive notice, work injustice, by subjecting the principal to the consequences of an illicit transaction, although he had no participation in it, to enable the agent, the actual violator of the law, and entitled to no favour, to take advantage of his own wrong, and to defraud his employer.

APPEAL from *Baltimore* County Court. *Assumpsit* for money arising from the sale of goods delivered to be sold, &c. *Plea*, *Non assumpsit*.

At the trial the plaintiffs, (the appellants,) offered in evidence a bill of lading, to prove that on the 28th of August 1812, they shipped 100 barrels of flour on board the ship *Willium Penn*, whereof the defendant, (the appellee,) was master, from *Baltimore* to *Lisbon*, the dangers of the sea only excepted, and consigned to the defendant to be sold by him on account, and at the risk of the plaintiffs, they paying freight at the rate of five dollars per barrel, payable by agreement in *Baltimore*, with primage and average accustomed. Also the following endorsement on the bill of lading: "For the better security of the within flour a certificate, purporting that it is my property, has been furnished by Mr. *Gill*. This memorandum therefore is to prove against me or my heirs, assigns or administrators, that the property is actually and *bona fide* the property of those who appear in the within bill of lading, and that the aforesaid certificate is merely and only to be used in case of necessity, to claim in case of capture or seizure in a foreign port, inasmuch as master's adventures are generally respected.

Ezekiel C. Wysham.

Baltimore, 28th August, 1812."

The ship sailed on the voyage, and in the course of it was captured by a *British* ship of war, and carried into *Kingston*, *Jamaica*, where admiralty proceedings were had against her and cargo. The defendant claimed the 100 barrels of flour as his private adventure, and they were restored to him. A certain *Wilkinson* and *Gilpin*, of *Kingston*, were appointed agents for the ship and cargo by the defendant, and they sold the flour in question for $1871 89, and applied the same to the disbursements of the ship, contrary to the wishes of the defendant. The defendant, on his return to *Baltimore*, received from *James Biays*, the owner of the ship, an account, in which there was a credit to the defendant of the said sum of $1871 89, and on which account a balance was due to himself. He made no objecti-

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on to this credit, or to any part of the account. The defendant then offered evidence to prove, that the ship was freighted from *Biays* by a certain *William Wood*, and a certain *Sampayo*, and that *Wood* and *Sampayo* had obtained a *British* licence for her; but gave no evidence to the jury to shew that the plaintiffs had any concern in procuring the licence; but did give in evidence, by a competent witness, that one of the plaintiffs was a young man in the counting house of *Biays;* that he was frequently on board the ship while loading, and that he knew she was not armed; that *Biays* never told the plaintiffs that the ship had said licence, nor did the witness know that they were acquainted with the fact or not; but he thought that no person at that time would have made such a shipment without they believed that there was such a licence on board the ship. The defendant offered no other evidence to shew that the plaintiffs had any knowledge of the licence. The defendant then, upon the whole evidence given by the plaintiffs and defendant, moved the court to direct the jury, that if they believed from such evidence that the said shipment of flour was covered by a *British* licence, and that that was known to the plaintiffs, then they were not entitled to recover. And the Court, [*Ward*, A. J.] did so decide; and also decided, that if the jury believed that the ship sailed under a *British* licence, the plaintiffs were not entitled to recover, whether they knew of the licence or not. The plaintiffs excepted. Verdict and judgment for the defendant, and the plaintiffs appealed.

The cause was argued in this court before Buchanan, Earle, and Johnson, J.

Winder, for the Appellants, cited *The Hiram*, 1 *Wheat.* 440, 446.

Murray, for the Appellee, cited *Patton vs. Nicholson*, 3 *Wheat.* 207, *(notes)*. *The Caledonian*, 4 *Wheat.* 100. *The Langdon Cheves*, *Ibid* 103. *The Hiram*, 1 *Wheat.* 447, *(note)*; and *The Franklin*, 6 *Robinson*, 129.

Buchanan, J. delivered the opinion of the Court. It is contended, on the part of the defendant, 1st. That the sailing under a *British* license was illegal, and would have subjected the property on board the ship *William Penn* to capture and to condemnation in a court of prize, whether the plaintiffs had actual knowledge of the license or not, on the principle of *respondeat superior*. 2d. That an action of *assumpsit* will not lie on an illegal transaction; and therefore that the plaintiffs are not entitled to recover in this suit.

It will not admit of denial, that the sailing under the license in question was illegal; and in the case of *The Ship Hiram*, 1 *Wheaton's Rep.* 440, referred to in the argument, it was ruled, that the knowledge of the agent affected the principals, though in reality they might have

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been ignorant of the fact that there was a license on board; on the ground that the knowledge of the agent was constructively their knowledge, and that such constructive knowledge precluded them from showing the want of actual notice. And acting on that principle, if this case was now for adjudication in a prize court, on a question between the captors and captured, the cargo would probably be condemned. But it is believed, that the considerations governing courts of prize, in raising such constructive knowledge for the purpose of condemnation, to the exclusion of proof of actual ignorance of the fact on the part of the claimant, do not apply to this case. It is not like the case of a claimant, and the government, or the captors, and does not involve the same principles. It is true that as between the parties to an illegal transaction no suit will lie by one against the other. And admitting that if the plaintiffs did know that the vessel was covered by a *British* license, they would be so far considered parties to an illegal transaction, as to be thereby rendered incapable of sustaining this suit, on the principle of *pari delicto, potior est conditio defendentis.* Yet if they had no knowledge of the fact, they were not *in delicto* at all, and the maxim does not apply to them. They had a right to ship their flour to *Lisbon*, and to constitute the defendant their agent; there was no illegality in that transaction. The taking of the license was a separate and distinct thing, and if not known to the plaintiffs did not enter into the contract between the parties, or form any part of the consideration on which it was founded, but was wholly unconnected with it. And to that transaction, if they were in fact ignorant of it, the plaintiffs were not parties, and are unaffected by it—The only *delictum* attached to the defendant, supposing him to have had a concealed *knowledge of the license* on board. And it would be too much to say that he by his own illegal act, not known to the plaintiffs who ought to have been informed of it, could so taint an otherwise fair transaction, as to entitle him to retain the property entrusted to his care, and apply the proceeds to his own use. The doctrine of constructive knowledge, on which prize courts have condemned the property of innocent claimants, is a creature of policy, and nurtured from necessity for the purpose of preventing illicit trade, violation of allegiance, &c. But in a case between a principal and his agent, in which the latter seeks to shelter himself behind his own illegal act, the same reason does not hold; and the law will not, on the principle of constructive notice, work injustice, by subjecting the principal to the consequences of an illicit transaction, whether he had any participation in it or not, to enable the agent, the actual violator of the law, and entitled to no favour, to take advantage of his own wrong, and to cheat his employer —Such a doctrine would lead to great abuses.

It is the opinion of this court, that the judge, who tried the cause, went too far in saying, that if the ship sailed

under a *British* license the plaintiffs were not entitled to recover, whether they knew of the license or not; and therefore the judgment is reversed.

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JOHNSON, J. It appears in this case that the plaintiffs below shipped a parcel of flour on board a vessel called the *William Penn* in the year 1812, on a voyage from *Baltimore* to *Lisbon*, to be sold by the defendant, the captain of the vessel, for the plaintiffs. The vessel was captured by a *British* ship of war, and carried to *Jamaica*, where the goods in question, the property of the plaintiffs, were restored to the defendant as his private adventure, who obtained the money for which the goods were sold; to recover which this suit was brought. To defeat the claim, the defendant offered to prove that the ship was owned by one *Biays*, and freighted from him by *William Wood*, and a certain *Sampayo*, who obtained a *British* license to protect the ship and cargo.

War existing at the time of this transaction between the *United States* and *Great Britain*, it was unlawful for the inhabitants of the *United States* to trade with, or under the protection of the enemy. The voyage, under the existing circumstances, being unlawful, on the part of the defendant, it is contended, that no cause of action can arise directly or indirectly which can be sustained in a court of justice.

Nothing is more clear than that where the plaintiff and defendant are equal violators of the laws of the country, the latter must prevail in any suit between them involving the violated laws of their country, on the established maxim, that *in pari delicto, potior est conditio defendentis.* And it is evident, that if the fact of the license having been obtained was known to the plaintiffs, in fact, or by implication, they were incompetent to sustain an action either for the cargo itself, or the proceeds thereof. But as their criminality arises from the knowledge of the fact, immediately or constructively, if neither is brought home to them, they are competent to recover from their agent the money retained by him on the sale of the property. It would be extraordinary indeed, if the captain of a vessel, and consignee of the cargo, was competent to do an act against the laws of his country, without the knowledge or participation of his principal, which could free him from that responsibility imposed upon him prior to the commission of the illegal act by the captain himself. The maxim has no bearing on such a case; the plaintiffs being actually and constructively ignorant of the transaction, can never be said to be *in pari delicto.*

The defendant's counsel in the trial of the cause contended for no such principle. The court was called on to instruct the jury, that if they believed from the evidence that the shipment of the flour, for the amount of which the suit was brought, was covered by a *British* license, and *that known to the plaintiffs*, then they could not recover. That direction ought to have been given; but the court er-

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red in directing the jury that the plaintiffs were incompetent to recover, whether they *knew* of the license *or not.*

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DECEMBER.

Where a rule had been laid on a sheriff to return a writ of execution issued from the court of appeals by a particular day, no judgment can be rendered against him in that court under the act of 1794, *ch.* 54, if he fails to make return by the day, unless there is an affidavit stating that the execution had been delivered to him, or that he had been served with a copy of the rule.

CADWALLADER VS. RINGGOLD.

WINDER, for the Plaintiff, obtained a rule on the sheriff of *Washington* county, to return the writ of *fieri facias*, issued in this case, by the 18th instant. The time having expired, and no return being made, he moved the court for a judgment against the sheriff under the act of 1794, *ch.* 54, § 1.

CHASE, Ch. J. Unless there is an affidavit stating that the execution had been delivered to the sheriff, or that a copy of the rule on the sheriff to return it has been served on him, the court cannot enter a judgment against the sheriff. Such has been the practice adopted by this court in similar cases.

RULE DISCHARGED.

DECEMBER.

In an action of *assumpsit* upon an express contract to pay rent for a house, the defence set up was, that a "large multitude of armed men, with high and irresistible force, seized upon and destroyed the demised premises, and evicted the lessee" —*Held*, that as the destruction of the demised premises by fire will not excuse the tenant from payment of the rent on an express covenant, a principle decisive of this case, so here, although it is a verbal, and not a written contract, on which the claim is founded, yet it is such a lease as the law recognizes; and the promise to pay the rent reserved, is just as valid and binding as if it was a covenant under seal; and that the plaintiff was entitled to recover upon the first count in his declaration, which charges an express contract to pay rent.

WAGNER VS. WHITE.

APPEAL from *Baltimore* County Court. *Assumpsit.* The declaration contained two counts; the *first* upon an express contract to pay rent, and the other for use and occupation. The defendant, (now appellant,) pleaded 1. *Non assumpsit.* 2. "That a large multitude of armed men, with high and irresistible force, did seize upon the said premises, and him the defendant did evict and turn out of the said premises, and the said house and improvements thereon did break down and destroy, and ruin, and thereby prevented the defendant from having or receiving any use or benefit from the said premises; and this he is ready to verify," &c. 3. "That a large body of armed men, enemies to the *United States* and this state, with irresistible force evicted and turned the defendant out of the possession of the premises aforesaid, and the house and buildings thereon broke and destroyed, and prevented the defendant from having and enjoying the use and occupation of the same, for and during the time aforesaid; and this he is ready to verify; wherefore he prays judgment," &c. To the first plea the plaintiff joined in issue. To the second plea she demurred; and to the third plea she replied, "That the defendant was not, with irresistible force, evicted and turned out of the possession of the premises by a body of armed men, enemies to the *United States* and this state; and this the plaintiff

Whether such eviction would not be a good bar to an action for use and occupation only? *Quere.*

prays may be inquired of the country, &c." Issue joined. The county court gave judgment on the demurrer for the plaintiff; and on the issues in fact verdicts were found for the plaintiff, and judgment being thereon rendered, the defendant prosecuted this appeal.

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Wagner vs White

The cause was argued in this Court before BUCHANAN, EARLE, and JOHNSON, J.

Winder, for the Appellant.

Pinkney and *R. Johnson*, for the Appellee, referred to *Belfour vs. Weston*, 1 *T. R.* 310. *Monk vs. Cooper*, 2 *Stra.* 763. S. C. 2 *Ld. Raym.* 1477. *Hallett vs. Wylie*, 3 *Johns. Rep.* 44. *Auriol vs. Mills*, 4 *T. R.* 98. *Shubrick vs. Salmond*, 3 *Burr.* 1637. *Mills vs. Auriol*, 1 *H. Blk. Rep.* 433; and *White vs. Wagner*, *(ante* 373.*)*

BUCHANAN. J. delivered the opinion of the court. The defence set up is not confined to either of the counts in the declaration, but goes to the whole; which presents the question, whether the facts stated in the second plea are sufficient to absolve the lessee from his liability for the rent, which by his express agreement he contracted to pay? For, if the lessor is entitled to recover on the first count in the declaration, it is enough, though perhaps such eviction and destruction would be a good bar to an action for use and occupation only, without any lease or agreement to pay rent. The facts relied on are, that a "large multitude of armed men, with high and irresistible force, seized upon and destroyed the demised premises, and evicted the lessee." In an action on the case in nature of waste, between the same parties, and on the same facts, it was determined by this court at June term 1818, *(ante* 373,*)* that the destruction being neither by the act of God, nor of enemies to the state, (*in England*, the king's enemies,) the defendant was answerable in damages to the plaintiff for the injury done to the premises; and that case would seem to go the whole length of settling this. For if an action on the case, in nature of waste, will lie against a tenant for an injury to the premises, which he had not the means of preventing, it would be difficult to find a reason why a lessee should not be answerable for rent, which he has expressly stipulated to pay. But independently of that decision, it is a principle settled and established by numerous cases to be found in the books, "that the destruction of the demised premises by fire, will not excuse the tenant from payment of the rent, on an express covenant." Which principle is decisive of this case. For though it is a verbal, and not a written contract, on which the claim is founded, yet it is such a lease as the law recognizes, and the promise to pay the rent reserved is just as valid and binding as if it was a covenant under seal. The lessor has done no act to discharge the lessee, and there is no solid reason

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why a destruction of the premises by such a number of men as he could not resist, should exonerate him from the rent any more than a destruction by fire, which he could not prevent. It is said to be hard on a lessee to be made to pay rent, for property which he has been deprived of the use of, without any fault on his part. It is so; but it would be a greater hardship on lessors if the law were otherwise. And however hard the general rule may seem to bear on a lessee, clearly without fault, it is better that the law should be so, and that every lessee should be made to feel it his interest to preserve the premises entrusted to his care, than that landlords, (who being out of possession, and not in a situation to protect their property,) should be placed at the mercy of their tenants, who may protect themselves by the terms of their leases; and the omission to do so shows a willingness to incur all risks. There is nothing in this case to take it out of the general rule. The defendant has bound himself by express agreement, without any reservation or exception, to pay the rent, and he must stand by his contract.

JUDGMENT AFFIRMED.

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Where the defendant, both in his own right and as administrator, was indebted to the plaintiff, to whom he made partial payments, and the question was, in what way those payments were to be applied?—*Held*, that a debtor, standing in the situation of the defendant, has the right, when he pays money, to apply the payment either to the debt due in his own right, or to the one due in *auter droit*; and whether he made any and what application, was a question of fact upon the evidence solely cognizable by the jury.

APPEAL from *Charles* County Court. *Assumpsit.* One count for sundry matters properly chargeable in account, and another count for use and occupation of a farm by one *Aquila Franklin*, &c. The general issue pleaded. At the trial the plaintiff, (now appellant,) proved by a competent witness, that in the year 1815 he called upon the defendant, (the appellee,) and shewed him the following account:

" Dr. To *Margery Fowke.*

To the rent of the tavern and lot at the *Hill Top*, for the year 1812, at £40	£40
To the rent of ditto ditto do. for the year 1813, at £40	£40
	£80

Supra. Cr.

By an order in favour of *James Fowke* for	£13 8 4
By an order in favour of *Gusts. Brown* for	£13 8 4
By an order in favour of *Gerard Fowke* for	£13 8 4
Balance due	£40 5 0"

On the account was proof made by the plaintiff's affidavit of the justice of the claim, and also an affidavit made by *Gustavus Brown*, of the account's being just. The account was passed by the orphans court; which account

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the defendant acknowledged to the witness was correct, and that he felt bound to pay the first year's rent, and offered assignments of judgments as payment. It was admitted also that the defendant was bound for the first year's rent in his individual character, and in his character as administrator for the second year's rent. Receipts were produced and in proof to shew the payment of one year's rent for the same sums, and paid to the same persons, as mentioned in the account proved. It was further in proof, that when the last receipt was executed the defendant settled the sum therein specified *as administrator*. There was no other proof to shew an election on the part of the defendant to apply the payments to the discharge of the debt due from him as administrator, or to the debt due in his own right. Upon the prayer of the defendant's counsel, the Court, [*Johnson*, Ch. J.] instructed the jury, that when the payments were made there was no election on the part of the defendant as to the application of the payments to the first or second year's rent, nor any evidence to shew an election on the part of the plaintiff as to the applications of the payments; and that the law in such case would make the election, and would apply the payments to the first year's rent, notwithstanding the evidence herein before mentioned. The plaintiff excepted; and the verdict and judgment being against her, she appealed to this court.

The cause was argued before BUCHANAN, MARTIN, and DORSEY, J. by

Stone, for the Appellant, and by
Stonestreet, for the Appellee.

DORSEY, J. delivered the opinion of the Court. It appears by the bill of exceptions that the defendant, both in his own right, and as administrator, was indebted to the plaintiff, to whom he made partial payments; and the question in controversy at the trial was, in what way those payments were to be applied? It is clear that a debtor, standing in the predicament of the defendant, has the right, when he pays money, to apply the payment either to the debt due in his own right, or to the one due in *auter droit*; and whether he made any, and what application, is a question of fact solely cognizable by the jury. There is evidence stated in the exception from which the jury might infer that the defendant applied the payment in his representative character. Whether this testimony was true or not, was a question solely for the consideration of the jury; and the court below erred, when they instructed the jury, that the defendant had not made any application of the payment. The judgment of the court below must be reversed.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

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In *assumpsit* to recover a sum of money retained by the defendants, on account of freight, out of the proceeds of that part of the cargo which was the property of the plaintiff—*Held*, that the contract between the parties, as collected from the charter party, the bill of lading, and a subsequent agreement, was that the goods shipped by the plaintiff should not be landed on the island of *Sylt*, but at some permitted port on the continent of *Europe*, before any freight should be earned; but in the event of the whole of the ports on the continent being *shut*, then, and not otherwise, the defendants should be entitled to freight on the goods being landed in *England*, with a stipulated addition. That by the term '*shut*,' was meant an occlusion, by the municipal regulations of the country. That the shipowners had a right to make any other contract they pleased with the plaintiff, varying or annulling the charter party, in relation to his part of the cargo. That whether it would or would not have been expedient to attempt the landing of the cargo on the continent, was not a matter for the jury. That the only question for the jury was, whether the whole of the ports on the continent of *Europe*, were, by municipal regulations, closed against the admission of the goods of the plaintiff? If they were, the vessel earned freight by going to *England*; if on the contrary any of them were open to such goods, the defendant had no right, under the stipulations in the agreement, to charge freight on landing them in *England*; and the plaintiff was entitled to recover any sum of money retained by the defendants on that account, notwithstanding the distracted state of *Europe* might have rendered it hazardous to seek such open ports.

APPEAL from *Baltimore* County Court. *Assumpsit* for money had and received, lent and advanced, laid out and expended, and on an *insimul computassent*. Pleas, the general issue. At the trial the plaintiff, (now appellant,) offered in evidence a charter party of affreightment under seal, dated the 25th of April 1810, executed between the plaintiff, together with several other shippers, and the defendants, (the appellees,) owners of the ship or vessel called the *William Wilson*, whereof *P. Wirgman*, one of the defendants, was master, of the burthen of, &c. lying in the port of *Baltimore*. Covenant by the owners, that the ship should be tight, &c. and that the master would receive and take, and the freighters should load, and put on board the said ship, a cargo of lawful and permitted goods, &c. and being so laden, the master should proceed with the ship from the port of *Baltimore*, north about, for the port of *Sylt*. "And if on arrival there it can be ascertained that the ports of *Hamburg* and *Bremen* are open to the admission of *American* vessels, that the said master shall forthwith proceed to whichsoever the said ports the supercargo and himself shall think most for the interest of the freighters. But should the said ports of *Hamburg* and *Bremen* continue closed, then the said cargo shall be landed at *Sylt*, if permitted; and in case of refusal to permit the same to be landed at *Sylt*, that then the said master shall proceed therewith to such permitted port in the *North Sea*, or the *Baltic*, as he, and the supercargo, shall order and direct. And should the *Baltic* be also closed against the admission of *American* vessels, in such case the said master shall proceed with the said cargo to such other port as he and the said supercargo may in their judgment think most proper. And that on the arrival of the said ship at the port of delivery, the said master shall and will make a right and true discharge of the said cargo to the said supercargo, or to such other agent, factor or consignee, of the freighters, as they may direct, agreeably to bills of lading to be signed for the same, and so end and finish the said intended voyage; the dangers of the seas, restraint of rulers, and princes, fire, pirates and enemies, only, excepted." The freighters covenanted to pay freight agreeably to the bill of lading; "provided the said cargo be discharged at a port in the *North Sea*; but if delivered at any port in the *Baltic*, not higher than *Kiel* or *Colberg*, then the said freighters covenant, &c. to pay unto the owners an advance of 10 p. c. on the amount of the freight money stipulated by the said bills of lading. If higher that *Kiel* or *Colberg*, and not higher than *Konigsburg*, a like advance of 15 p. c. and if higher than *Konigsburg* a like advance of 20 p. c. And should

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the *Baltic* be shut, such further advance on said freight as shall be settled by arbitration, together with 5 p. c. primage, on whichsoever sums shall be earned as aforesaid; which said sums shall be deemed and taken in full of freight, primage, &c. and that the said freight, money and primage, shall be paid immediately on the delivery of the said cargo," &c. The plaintiff also offered in evidence a bill of lading for that part of the cargo shipped by the plaintiff on board the ship *William Wilson*, (the ship named in the charter party, dated the 8th of May 1810,) *P. Wirgman*, one of the defendants, master, bound from the port of *Baltimore* for *Sylt*, and a permitted port in the *North Sea* or *Baltic*, mentioning the goods laden, and that the goods were shipped "for account and risk of the shipper, a citizen of the *U. S.* of *America*, and resident merchant of *Baltimore*, to be delivered in the like good order and well conditioned, at the aforesaid permitted port, (the dangers of the seas only excepted,) unto Messrs. *David Parish & Co. Hamburg*, or to their assigns, he or they paying freight for the said goods at the rate of four pounds sterling per ton for logwood, and Nicaragua wood, nine shillings sterling pr. hundred weight for sugar, and eight shillings sterling per hundred pounds for coffee, with five per cent primage, with primage and average accustomed." He also offered in evidence the following agreement, dated the 14th of May 1810, made and entered into by the defendants at the plaintiff's request, and by them addressed and delivered to the plaintiff. "we hereby agree and acknowledge that the sundry goods shipped by you on board the ship *William Wilson*, *Peter Wirgman*, master, are to be landed in a permitted port on the continent of *Europe*, (meaning that they are not to be landed on the island of *Sylt*,) before the freight is earned. But should the whole of the continent be shut, the freight, with an addition, (as arbitrators may determine,) will be earned should the property be landed in *England* agreeable to the custom of the country." He also offered in evidence copies of the three following letters of instruction from him, the plaintiff, to Messrs. *Parish & Co.* of *Hamburg*, dated at Baltimore on the 8th, 9th. and 14th of May 1810. 1. "Through the recommendation of our mutual good friends Messrs. *Robert Gilmor & Sons*, I have taken the liberty of enclosing you invoice and bill of lading for sugar, coffee and dye woods, of the first quality, shipped on board the ship *William Wilson*, *Peter Wirgman*, master, to your address, bound for *Sylt*, and a permitted port in the *North Sea* or *Baltic*, the call at *Sylt* is merely with a view to get information if your port is open to admit her cargo; if so, it is my wish to dispose of my property immediately on its arrival, to the best possible advantage, provided you do not see a prospect of better markets, in which case you will be guided by your own judgment. However, I would prefer a sale if a small profit could be obtained. If a sale is effected at your port, I wish you to remit, as soon as possible after the arrival of

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the goods, to my friends Messrs. *John Heathcote & Co. London*, as large an advance as you can conveniently make, and when sales are closed, the nett proceeds, advising the same. It is to be observed the ship is not discharged from her freight until the cargo is landed in a port on the continent of *Europe*. Should your port not admit the entry of her cargo, in that case you will address my property to your friends in a port where it will be admitted, and you judge it will turn out most to my advantage. On account of the unsettled state of affairs, and captain *Wirgman* being a particular friend of mine, should the property be denied an entry at your port, and the ship proceed to where you have no friends to confide in, in that case you will consult with captain *Wirgman* for the safety of my property, giving him such instructions as you may judge most for my interest, when you will order remittances, as before directed, if exchange is in favour, if not, let the nett proceeds be shipped me by the first opportunity in canvass, Russia duck, and brown sheeting, a proportionable quantity of each. The reason why I have been so particular in the bills of lading respecting the logwood, is that I was informed that part had been sawed and split, in order to make stowage, though the former owner of the ship denies it. However, if this is not the case, the number of pieces and weight will be found correct, as per bill of lading. Hoping this venture may arrive to a good market, and that you will exert yourself for my interest, I remain," &c. 2. "In case a remittance in bills should not prove favourable, I have thought proper to inclose a list of articles that would answer, provided they were of good qualities, purchased at the stipulated prices, and shipped immediately direct to this port at moderate freight, but still would prefer the bills. List of burlaps or halblacken in bales of 100 ells, 5 bales," &c. "or a proportionable quantity of the foregoing articles to the amount of the funds in hand, in case of shipment." 3. "Since writing to you the shippers generally on board the *William Wilson* have deemed it expedient to enter into a stipulation or charter party with the owners, in case your port should not be open to receive her cargo. As this instrument of writing seems to be called for in your ports, I have thought proper to sign the same, though it is in no case to invalidate the bill of lading, further than to allow the additional freights stipulated, in case she should proceed further than the two first ports, as you will observe by the enclosed letter from the owners. Be particular in forwarding certificates of landing." The originals of these letters were put into the possession of *Peter Wirgman*, previous to his leaving the port of *Baltimore* on the voyage aforesaid, and were afterwards opened by the crew of a privateer that captured the ship *William Wilson*, and were restored to *Peter Wirgman* on the acquittal of the ship by the prize court of *Christiansand*. The plaintiff further offered in evidence the following letter of instructions, written by the plaintiff, also dated the 8th of May 1810, and

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addressed and delivered to *Peter Wirgman*, one of the defendants, and who was, as before stated, master of the ship. "On account of the unsettled state of affairs on the continent of *Europe*, I have thought proper to request my friends Messrs. *Parish* & *Co.* of *Hamburg*, in the event of the cargo of the *William Wilson* being denied entry at their port, to consult with you on the further destination of the ship, and the disposal of my interest on board. In case they have no friend at the port she may proceed for, you will please to take charge of it, and advise with them what is best to be done for my interest. On your arrival off *Sylt*, should the situation of affairs be such as to prevent you from communicating with Messrs. *Parish* & *Co.* in that case you will have to proceed with the cargo where you judge it will be most advantageous for all concerned, when I shall consider my part as entirely under your charge, referring you for government to my letter of instructions to Messrs. *Parish* & *Co.* which in that case you will open. You will, no doubt, have occasion to get assistance in sales; be particular in applying to a house of the first respectability, taking care to get the business closed if possible before your departure. Any attention paid to the delivery of my interest will be thankfully acknowledged, and shall satisfy you for any trouble or expense you may be at for the safety and security of the same. The reason why I have been so particular in the bills of lading respecting the logwood, is that I was informed part had been sawed and split in order to make stowage, which was contrary to agreement, though the former owner, Mr. *Levering*, denies it. However, if this should not be the case, the number of pieces and weight will be found correct as pr. bill of lading. Satisfied that your best exertions will be used to promote my interest, and wish you a safe and prosperous voyage." The plaintiff further offered in evidence the five following letters from *P. Wirgman* to Messrs. *Parish* & *Co.* respectively dated the 13th of July, 14th of September, the 14th of October, and the 8th and 10th of November 1810, 1. Dated at *Hitteroe*, the 13th of July 1810. "It is with real concern I apprise you of the capture of the ship *Wm. Wilson* on the 29th June, (by a *Danish* privateer,) on board of which, as you doubtless are informed, I have the care of property shipped by *Alexander Mactier*, Esqr. therefore I take the liberty of soliciting, as early as possible, your advice, and any information you conceive will conduce to his interest, which will very much oblige," &c. 2. Dated at *Flekkefiord*, the 14th of September 1810. "I had this pleasure, 13th July, apprising you of the unfortunate detention of ship *Wm. Wilson* and cargo, considerable part of which is to your address, as no doubt you are advised by duplicate. I then craved your advice respecting our future destination, but a more extensive knowledge of prize cases induces me to believe was I in possession of it, it would be of no advantage, as to be *Americans*, however accurate

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their papers, and uncontaminated their neutrality, is sufficient cause, under frivolous pretences to force us through the court of appeals, and by that means ruin our speculations. In 3 or 4 weeks we expect the promulgation of our sentence at *Christiansand*, and should I find it necessary I shall return home and collect uncontrovertible proofs of the facts we have already stated." 3. Dated at *Christiansand*, the 14th of October 1810. "I yesterday had the pleasure of receiving your much esteemed favour of the 2d inst. and regret my absence from the ship prevents my detailing the particular quantity of the articles to your address, which consists chiefly of sugar, coffee and logwood, amount to about $30,000, shipped by Mr. *Alexander Mactier* of *Baltimore*, who, as well as our house, have letters to you from our mutual friends *Robert Gilmor* & *Sons*. I can only account for your not receiving invoices and bills of lading, by the bearers of the duplicates being equally unfortunate with ourselves, and their letters consequently detained in the prize courts, as several hundred we brought are in that situation, many of which contain large remittances. I am now in daily expectation of our sentence, of which you may depend upon being immediately advised." 4. Dated at *Christiansand*, the 8th of November 1810. "I had this pleasure 14th ultimo, in conformity to which I have the satisfaction of announcing on the 5th inst. my ship's papers were returned in pursuance to the sentence of the prize court, from which no appeal was entered. The situation of the property still causes me much anxiety, and the numerous dangers that envelope us have induced the determination of discharging the cargo in *Flekkefiord*, where the ship at present lays, for which purpose we have petitioned the Prince Regent, and from our arrival being prior to these recent regulations, anticipate a favourable result." 5. Dated at *Christiansand*, on the 10th of November 1810. "I had this pleasure the 8th inst. since which I am favoured with your esteemed communication of 30th ultimo, and cannot but express my gratitude for your provisions for our case, through your friends Messrs. *Duntzfelt* & *Co.* which I feel a persuasion would have been of essential service, but am happy I shall have no occasion to avail myself of it, as the captors very prudently decline to enter an appeal. I regret your letter does not contain any favourable information upon which we might be induced to alter our determination of unloading in *Flekkefiord*, which I intend commencing on Wednesday next." The plaintiff also offered in evidence two letters from Messrs. *Parish* & *Co.* to *P. Wirgman*, dated at *Flekkefiord*, *Hamburg*, on 2d and 30th of October 1801; that of the 2d of October, acknowledged the receipt of his letter of the 14th ultimo, referring to another of the 13th of July, which they had not received; and stating that they had never received any information respecting the consignment by the *William Wilson*, except from their mutual friends Messrs. *Widow, John Langs, & Son, Bremen*, who mere-

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ly mentioned that part of the cargo was to their (the *Parish's*) consignment. That they should have been very happy to render their services useful to him during his unfortunate detention in *Norway*, through the medium of their agents, in advising with him respecting his future proceedings after sentence had been pronounced at *Christiansand*, and as very few escaped condemnation at the prize courts in *Norway*, they must suppose his case would not prove an exception, and the appeal carried to the high court of admiralty in *Copenhagen*, where his presence would be necessary. They requested him to inform them who were the shippers of the consignment to their address, and to forward any letters he might have for them, with any other information that might be useful. That if he proceeded to *Copenhagen*, their friends Messrs. *Duntzfelt & Co.* would cheerfully render him every service in their power for that purpose. That all the *Danish* ports being shut against the admission of vessels loaded with colonial produce, it became no easy matter to point out a proper destination for the *William Wilson*, after she should be liberated; but on this subject they had time enough to correspond after they should be informed by him of the goods he had on hand. That several of their friends, however, proceeded from *Gottenburg* to *Carlsham*, there to unload their cargoes, from whence, during the winter, goods might be transported by degrees to the opposite coast, by making arrangements for their admission at the different *Prussian* ports. That their partner, *J. Parish*, jr. was then in *Sweden*, and would be happy to afford him his assistance and advice, &c. The letter of the 30th of October 1810, acknowledged the receipt of his letter of the 14th inst. in answer to theirs of the 2d, and that they observed the goods he had to their consignment consisted of sugar, coffee and logwood, amounting to $30,000, shipped by Mr. *A. Mactier*, who, as well as his house, had letters to them from their mutual friends Messrs. *R. Gilmor* & *Sons*; that these letters, they observed, were detained in the prize court. That until then they were without any direct intelligence of this shipment. They were anxiously waiting to hear the result of his sentence, but apprehended it would not prove favourable; in this event he would be under the necessity of proceeding towards *Copenhagen*, to attend to the appeal in the high court of admiralty at *Copenhagen*, where their friends, Messrs. *Duntzfelt* & *Co.* would use every exertion in his favour. That he would be informed by the public papers of the late *French* and *Danish* decrees respecting colonial produce—of the heavy duties laid on both there and in *Holstein*. That under existing circumstances it would become a difficult matter to point out a proper port of discharge, so many changes taking place, and that if any further alterations should take place, they should keep him informed. The plaintiff further offered in evidence, that the ship *William Wilson* sailed on the voyage mentioned in the charter party, with the

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goods and merchandize mentioned in the bill of lading; and that while on her voyage, and before her arrival at the island of *Sylt*, she was captured on the 29th of June in the said year, by a *Danish* privateer, and carried to the port of *Hitteroe*, in *Norway*, and subjected to admiralty proceedings as prize by the captors. That the admiralty court finally decreed the restoration of the ship and cargo on the 18th of November following, and caused her on that day to be delivered up to *P. Wirgman*. He further offered in evidence certain depositions, taken under commissions issued in this cause at his instance, to *Salem* in *Massachusetts*, and to *Philadelphia* in *Pennsylvania*, for the purpose of proving in what manner certain supercargoes and others conducted themselves, who sailed in vessels on voyages to the north of *Europe*, during the years 1809, 1810 and 1811, and the state of the different ports, &c. during these years. He further offered in evidence, that the ports of *Denmark*, *Sweden*, *Prussia* and *Russia*, in the *Baltic*, were at that time open to *American* vessels, and the ship *William Wilson* could with safety have proceeded to any of the ports of *Denmark*, *Sweden*, *Prussia* and *Russia*, and delivered and sold her cargo to advantage; and that other *American* vessels did, about that time, proceed up the *Baltic*, and deliver and sell their cargoes; but that *P. Wirgman*, instead of proceeding thither, sailed from *Norway* directly to the port of *Hull* in *England*, and there delivered the cargo of the said ship to Messrs. *Borthus* & *Boster*, resident merchants of *London*, whom he selected and chose for that purpose. That *E. Thomman*, the supercargo, who was placed on board the said ship by the other shippers, but who had no control over the goods and merchandize of the plaintiff, was left in *Norway* when the ship sailed as aforesaid. He further offered in evidence, that the defendants received from Messrs. *Borthus & Boster*, to whom the cargo was delivered as aforesaid, from the proceeds of that part thereof which belonged to the plaintiff, the sum of $2196 61. the freight stipulated in the bill of lading, for the transportation of the plaintiff's goods and merchandize; and also the further sum of $2450 36, as additional freight, for landing the same at *Hull* in *England*; and also the sum of $180 88 for demurrage. He further gave in evidence, that *P. Wirgman*, after leaving the port of *Flekkefiord*, in *Norway*, did not proceed to the island of *Sylt*, where he might have gone, the same being an open and free port, and that the cargo would have been permitted to be there landed. He also offered in evidence, that in the understanding of the merchants of *Baltimore*, when the contract of charter was executed, a permitted port in the *North Sea* was understood to apply to a port on the continent of *Europe* only. The defendants then gave in evidence, that *P. Wirgman* and *E. Thomman* applied to the *Danish* government for liberty to unlade and dispose of the cargo of the *William Wilson*, after restoration, at the port of *Flekkefiord*, in *Norway*, where she lay,

which application was depending until about the 1st of December 1810, when it was refused, and *P. Wirgman* was ordered by the *Danish* government to leave *Denmark*. The only evidence offered of that fact was the evidence of *H. Campbell*, one of the crew of the ship, that the pilot who navigated the ship from *Flekkefiord*, stated, on coming on board of the vessel, in the presence and hearing of the crew, and in answer to a question by one of them, that he was directed to take the vessel to sea without delay, but did not state by whom or by what authority such direction was given. The defendants further offered evidence to prove, that the cargo of the plaintiff was colonial produce, and that an *American* vessel, laden with colonial produce, could not proceed to any part of the *Baltic*, nor to any port of the continental powers in the *North Sea*, without imminent risk of having the ship and cargo seized and confiscated under the orders and decrees of the several continental powers, for the purpose of enforcing, what was called, the continental system of the Emperor of *France*. That it was extremely hazardous, if not impracticable, at that season of the year, to prosecute a voyage from *Flekkefiord* up the *Baltic*, from the severity of the season and climate, and that no prudent navigator would voluntarily have attempted it; and that *French* and *Danish* privateers were very numerous in that sea, and captured all *American* vessels that they fell in with; and that condemnation followed all *French* captures. They further gave in evidence, that *P. Wirgman*, under these circumstances, believed that the only prudent and safe course for him to pursue, was to proceed to *Hull* in *England*, a port in the *North Sea*, where he accordingly did proceed, and safely delivered the cargo as stated in the plaintiff's evidence. They further offered in evidence, that *E. Thomman* concurred and assented to the ship's proceeding to *Hull* under the circumstances aforesaid; and that although *P. Wirgman* applied for advice and instructions, (as appears by his letters to *Parish* & *Co.* set out in the plaintiff's evidence,) to *Parish* & *Co.* he obtained from them no other advice or directions than what is contained in the letters from *Parish* & *Co.* to *P. Wirgman*, also given in evidence by the plaintiff. They further offered in evidence, that the Island *Sylt*, is a part of *Holstein*, within the dominions of *Denmark*, and that the orders and decrees of the *Danish* government, in execution of the continental system, applied as well to *Sylt* as any other part of the *Danish* dominions, and that an *American* vessel with colonial produce on board, was as liable to seizure at *Sylt* as in any other port in *Denmark*. They further offered in evidence that the port of *Hull* is a port in the *North Sea*; and that there is no custom of merchants, or usage of trade among the merchants of *Baltimore*, which confines the expression of "a port in the *North Sea*," to a port on the continent of *Europe*. The defendants then moved the court to direct the jury, that *P. Wirgman*, by the charter party, the me-

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morandum, and the letters of instructions from the plaintiff to him, was the agent of the plaintiff, with discretionary powers; and if the jury should be of opinion from the evidence that *P. Wirgman*, in the exercise of an honest discretion, believed, either from the inclemency of the season and climate, or from the political state of the continent of *Europe*, or from dangers of capture by privateers, it was unsafe or inexpedient to attempt to land the cargo in any of the ports of the continent, or the *North Sea* or the *Baltic*, that then he was justified in proceeding to *England*, and was entitled to the additional freight stipulated in the agreement of the 14th of May 1810. That at all events, whatever the jury might believe in these respects, that *Hull* was a port for delivery of the cargo both in the charter party and the said agreement, and therefore that the plaintiff was not entitled to recover. That if *P. Wirgman*, in his character of supercargo, or agent for the plaintiff, relative to the management of the plaintiff's cargo, caused the goods to be delivered at *Hull*, then the defendants were entitled to freight, and the plaintiff could not recover. Upon this prayer the Court, [*Ward*, A. J.] gave the following direction to the jury. The facts in this case are so material for the solution of the contract of the parties, which like all other contracts must be determined according to its legal intent, that it is rather to be regretted that any question should be withdrawn from the jury, which it appears to the court, is the competent tribunal to adjudge all the law arising from the proof in the cause. As a prayer has been made it must be given, refused or modified. The court have carefully examined and compared the agreement, instructions and correspondence. A charter party, bearing date the 25th of April 1810, has been given in evidence, and whatever ambiguity it contains is removed by a subsequent agreement dated on the 10th of May following. By the latter it is stipulated that the goods are to be landed in a permitted port, in a particular sea, on the continent of *Europe*, before the freight is earned; meaning that they are not to be landed on the island of *Sylt*; and should the continent be shut, the freight, with an addition, shall be earned, should the property be delivered in *England*. From this subsequent agreement it is evident that *Hull* was not a port within the contemplation of the charter party. How far the testimony may go to show that the ports of the continent were shut, is a matter of fact not within the province of the court, but for the jury to determine. If the jury should be of opinion that the ports were closed, then *P. Wirgman* was justified, as the agent of the plaintiff, in delivering the cargo in *England*. The letter from the plaintiff to *Parish* & *Co.* directed them to consult with him as his agent. *Wirgman* asked their advice, but received none, and thereby, in the opinion of the court, *Wirgman* was placed in the same situation as if he had been cut off from all communication with them; in which event he was expressly authorised to act according to discretion. The

court cannot lay their hand on any letter of the plaintiff's which goes to tie *Wirgman* down to the instructions of *Parish & Co.* or to preclude him absolutely from acting without them, on the contrary it is manifest that the plaintiff considered *P. Wirgman* an agent, in whom he had vested discretionary powers. It follows, therefore, if the jury should believe that the ports of the continent were closed within the meaning of the articles of agreement, the owners of the vessel were entitled to freight; or if the jury should believe from the state of the ports, intended to be included by the agreement, that it was inexpedient to attempt the landing of the cargo on the continent, *P. Wirgman* was authorised to proceed to *England*, and land his cargo. The vessel consequently earned freight. To this direction the plaintiff excepted; and the verdict and judgment being against him he appealed to this court.

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The cause was argued before Buchanan, Earle, Johnson, and Martin, J. by

Harper and *Scott*, for the Appellant; and by
Pinkney and *Winder*, for the Appellees.

Buchanan, J. delivered the opinion of the court. It has been urged in argument on the part of the defendants, that the plaintiff, by his letter of instructions to *Peter Wirgman* of the 8th of May 1810, constituted him his supercargo or agent, and that he could not in that character prejudice the ship owners by any violation of his instructions, notwithstanding he was himself a part owner of the vessel; but was liable, if at all, only in his individual capacity. That question does not belong to the case, and is not necessary to be inquired into. The suit was brought, not for damages for a violation of instructions by *Peter Wirgman* as supercargo, but to recover a sum of money retained by the defendants, on account of freight, out of the proceeds of that part of the cargo which was the property of the plaintiff. The only question is, whether freight was earned or not? And that question lies within a narrow compass. The contract between the parties to this suit, to be collected from the charter party, the bill of lading, and the agreement of the 14th of May 1810 is, that the goods shipped by the plaintiff shall not be landed on the Island of *Sylt*, but at some permitted port on the continent of *Europe*, before any freight shall be earned; but in the event of the whole of the ports on the continent being shut, then, and not otherwise, the defendants shall be entitled to freight on the goods being landed in *England*, with a stipulated addition. By the term "*shut*," as here used, is meant an occlusion, by the municipal regulations of the country; and unless in that sense of the term all the ports of the continent of *Europe* were closed, the vessel could not earn freight by going to *England*, unless the plaintiff by some act of his has made

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himself liable. And it is said that he has so made himself liable; that the letter of instructions to *Peter Wirgman*, of the 8th of May 1810, vested in him, as agent, a discretion to do whatever in his opinion would be most to the interest of the plaintiff, in the event of his being prevented by the situation of affairs in *Europe*, from communicating with the Messrs. *Parish & Co.* and entitled the ship owners to freight, on the cargo being landed, in the honest exercise of that discretion, at *Hull* in *England*, which it is contended, is a port in the *North Sea*, within the meaning of the charter party and bill of lading. That paper being of anterior date, must be considered as revoked by the agreement of the 14th of May 1810, so far as it may contain any thing inconsistent with that instrument; but on an attentive examination it will be found to give no such discretion. *Peter Wirgman* by it is referred for his government to a letter of the same date from the plaintiff to the Messrs. *Parish & Co.* in which they are expressly instructed, that "the ship is not discharged from her freight until the cargo is landed in a port on the continent of *Europe*," thus tying down the ship-owners, in relation to the freight to be earned, to a delivery of the goods at some port on the continent. These two letters, taken together, and not that to *Peter Wirgman* alone, must be understood as furnishing his instructions. But it is argued, in relation to the letter to the Messrs. *Parish & Co.* so far as it respects a delivery of the goods at a port on the continent, that the plaintiff had no power, by any instructions either to the *Parishs* or to his supercargo, to deprive the defendants of rights acquired under the charter party, or to control the general voyage, in which other shippers were concerned. The answer to that is, that the ship-owners had a right to make any other contract they pleased with the plaintiff, varying or annulling the charter party, in relation to his part of the cargo. They did enter into a subsequent separate agreement with him, to which we must look for the rights of the parties. In that instrument the stipulation that no freight shall be earned by landing the cargo in *England*, unless all the ports on the continent of *Europe* should be shut, is just as explicit as the agreement not to land the goods on the Island of *Sylt*. It may therefore as well be said, that the defendants would have been entitled to freight on the goods being landed at *Sylt*, as in *England*; and it has not been contended that freight could have been earned by landing them at *Sylt*, though by the terms of the charter party they might eventually have been *landed* at that port. Hence it is not material to this case, what the true meaning of the charter party is, or what would have been the rights of the parties under that instrument as it originally stood. But admitting, for a moment, that the letter of the 8th of May to *Peter Wirgman* did give him the eventual discretion contended for, whether the contingency happened or not, on which the discretion was to arise, was a question for the consideration of the jury, and perhaps the judge stepped

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aside in saying that it did. *Wirgman* was bound to seek a communication with the Messrs. *Parish & Co.* and to obey their instructions, and was not tied down to a communication from *Sylt* only, which is merely mentioned as a convenient point of intercourse; and to show that he was not prevented from communicating with them, seven letters that passed between them were offered in evidence, two of which were from the *Parishs* to him. In their first letter of the 2d of October 1810, they request information concerning the cargo consigned to them, and by whom, and suggest difficulties respecting the future destination of the vessel, in the event of her being liberated, but say there will be time enough to correspond on that subject, after being informed of the cargo on hand; at the same time telling him what course had been pursued by several of their friends. And in their letter of the 30th of the same month, they instruct him, in the event of condemnation, to proceed to *Copenhagen* to prosecute an appeal; inform him of recent *French* and *Danish* decrees respecting colonial produce, and of the heavy duties imposed in *Hamburg* and *Holstein*, and speak of the difficulty at that time of pointing out a proper port of discharge, but promise to keep him informed of the state of affairs. To their avoiding to give positive directions touching the future destination of the ship, before she was liberated, no objection can be taken. But what was the course pursued by *Peter Wirgman?* In his letter of the 8th of November he advised the Messrs. *Parish & Co.* that the vessel had been released on the 5th, and that it was his determination to discharge the cargo in *Flekkefiord*, and without waiting for instructions; and as if to prevent any, in his last letter of the 10th of the same month, only two days later, he informed them that it was his intention to commence unloading on the Wednesday following; and afterwards, without consulting them on the subject, or giving any intimation of his intention, sailed for *Hull* in *England*, where he landed the cargo. It was his duty, after advising the *Parishs* of the liberation of the vessel, to wait at least a reasonable time, for their directions; and if he either declined, or by any improper act of his, prevented their further interference, he thereby violated his instructions, and removed the only ground on which the claim of discretion could rest. The judgment of the county court cannot in any view of the subject be sustained. Whether it would or would not have been expedient to attempt the landing of the cargo on the continent, was not a matter to be inquired of by the jury. The only question properly before them was, whether the whole of the ports on the continent of *Europe*, were by municipal regulations closed against the admission of the goods of the plaintiff which were on board the ship *William Wilson?* If they were, the vessel earned freight by going to *England;* if on the contrary any of them were open to such goods, the defendants had no right, under the stipulations in the agreement, to charge freight on landing them in *England*, and the plain-

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tiff is entitled to recover any sum of money retained by them on that account, notwithstanding the distracted state of *Europe* might have rendered it hazardous to seek such open ports.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

AN

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AGENT.
1. W by letter, in answer to an inquiry made of him by P, on what terms bills on *Batavia* to the amount of $30,000 could be had at *Amsterdam*, &c. stated that "bills on *Batavia* might be purchased to the amount of f. 75,000 or $30,000 at 48 per rix dollar of 2½ a piece, and 10 or 12 per cent. discount, to be paid immediately"—*Held*, by *Baltimore* county court, that the construction of the answer to the letter was that an investment of 75,000 florins, *Holland* currency, or $30,000 money of the United States, might be made in bills on *Batavia* drawn according to the usual course of trade in rix dollars; that for each rix dollar, for which the bills should be drawn, the purchaser would have to pay 48 stivers *Holland* currency; and the value of the rix dollar, thus drawn for, was 2½ florins *Holland* currency. *Smith, et al.* v *Gilmor, et al. Garn. of Willink, et al.* 177
2. —— *Held* also by that court, that if W was authorised by P, and he undertook to purchase bills according to the terms stated in the above answer, and none other, he was obliged to purchase according to those terms, or not to have purchased at all. *Ib.* 183
3. —— That court, being divided in opinion, (only two judges present,) refused the defendant's prayer to direct the jury, that W was not bound by his undertaking to procure bills which would produce in *Batavia* 30,000 *Spanish* dollars. On appeal—

Held, that the prayer ought to have been rejected. *Ib.*

4. —— That court, being divided in opinion, also refused the defendant's prayer to direct the jury, that if P, when he received the bills from W, knew them to be bills on *Batavia* for 30,000 rix dollars, and knew the sum of money for which they had been purchased; and that W, in making that purchase, undertaking the order, and giving the information on which it was founded, acted fairly and with good faith, and procured the bills on as advantageous terms as they could then have been obtained, then the acceptance of the bills by P was an assent to the purchase. On appeal—*Held*, that the direction asked for ought to have been given. *Ib.* 184

5. —— That court being divided in opinion, also refused the defendant's prayer to direct the jury, that if W by his letter to P, understood it to mean that bills on *Batavia* to the amount of 75,000 florins *Holland* currency, or $30,000 currency of the *U. S.* at 2½ florins to the dollar, might be purchased at the rate of 48 stivers *Holland* currency for each rix dollar of *Holland*, in heavy stivers, with a discount of 10 or 12 per cent, and intended his letter to be so understood at the time of writing it, then he is not responsible for having purchased the bills at that price. On appeal—*Held*, that the prayer ought to have been rejected. *Ib.*

See Assumpsit 1.
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AGREEMENT.

1. E H by agreement in writing, engaged, for value received of J E, to assign to him $150 of a judgment recovered by R G against J L, by the 20th of August 1810, or to pay to J E $150 with interest. E H obtained from R G an assignment of the judgment he had recovered against J L, which was for £75 damages, and 67 l wt. tobacco costs, rendered on the 17th of April 1804, a short copy of which judgment, with the *assignment of R G*, was transmitted by E H to J E before the 20th of August 1810, and which J E refused to receive, and it was returned to E H in July 1811. E H received from J L on the 30th of November 1810, $291 30, on account of the judgment, leaving, if interest could be demanded on the judgment, a larger amount than $150. In an action of *assumpsit* by J E against E H, to recover the $150 and interest—*Held*, that he was entitled to recover. *Harris* v *Earle's Ex'rs.* 274

See Assumpsit 6.
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ANSWER IN CHANCERY.

1. The answer of one defendant in chancery cannot be read in evidence against a co-defendant. *Hayward* v *Carroll, et al.* 518

See Court of Chancery 13, 14.

APPEAL.

1. Although certain proceedings in chancery are informal as to the admission of parties to defend a claim improperly exhibited by a trustee against the estate of a lunatic; yet as the decree allowing such claim, if unreversed, would be final and conclusive in its operation on those of the representatives of the deceased lunatic, who became parties to it—*Held*, that the appeal made by those representatives from the chancellor's decree be sustained, and that the decree be reversed. *Moore et al.* v *White*, 548

See Writ of Error.

APPLICATION OF PAYMENTS.
1. A, having two claims against B, on open account, and B makes payment of a sum of money on account, without specially applying it to either claim, it is to be applied to the claim prior in point of date. *Allstan's Adm'r. v Contee's Ex'r.* 351
2. Where the defendant, both in his own right and as administrator, was indebted to the plaintiff, to whom he made partial payments; and the question was, in what way those payments were to be applied?—*Held*, that a debtor standing in the predicament of the defendant has a right, when he pays money, to apply the payment, either to the debt due in his own right, or to the one due in *auter droit;* and whether he made any and what application, was a question of fact, upon the evidence, solely cognizable by the jury. *Fowke v Bowie*, 566

See Bill of Exchange 1.
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1. In an action of assault and battery, the declarations of the defendant of his criminal intentions against the plaintiff, are proper evidence to aggravate the damages sustained by the plaintiff, and as such ought to be considered by the jury. *Pratt v Ayler*, 448.

ASSENT.
See Agent 4.
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ASSIGNEE & ASSIGNOR.
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ASSIGNMENT.
1. The assignee of a debt resting on an open account, may, under certain circumstances, support an action of *assumpsit* thereon in his own name against the debtor—as where T was indebted to J and C on open account, and C transferred his interest therein to J, who gave notice thereof to T, and he assumed payment thereof to J. *Allstan's Adm'r. v Contee's Ex'r.* 351
2. A bill of lading is an assignable instrument, and it is a common mode of transferring the cargo of a vessel. *Owings & Cheston v Nicholson & Williams*, 68, 107

See Agreement 1.
—— Consignee & Consignor 1.
—— Surety 1, 2.

ASSUMPSIT.
1. A vessel with a cargo of flour on board, belonging to D and W, citizens of the *U. S*, sailed from *Baltimore* to *St. Thomas's* in the *West Indies*, in October 1799, with a view and for the purpose of there assuming *Danish* colours, and a *Danish* character, and under them of proceeding on a trading voyage for the benefit and account of D and W. She arrived there in November 1799, and was there put under *Danish* colours as the property of J V, a *Danish* subject, and dispatched to *Jacmel* by directions of D and W, she still continuing to be their property. In November 1799 she sailed from *St. Thomas's*, and arrived at *Aux Cayes*, in the Island of *Hispaniola*, about the 1st of December 1799. The cargo was there sold by E H, the agent of D and W, and a new cargo purchased with the proceeds thereof, which new cargo E H, in the same month of December, sent from *Aux Cayes* in the same vessel to *Curracoa*, for account of D and W, from whence the vessel returned to *Aux Cayes* about the 1st of April 1800. E H, still acting for D and W, did then purchase a new cargo of coffee at *Aux Cayes* for D and W, and put it on board the same vessel about the 20th of April 1800, dispatched the vessel and cargo from *Aux Cayes* back to *St. Thomas's*, consigned to N, of the house of M and N, as his own property apparently, but in fact for D and W. The vessel and cargo arrived at *St. Thomas's*, in May 1800, and were sold in August 1800, and the proceeds of sale paid to M as the partner of N, for and on account of D and W. For the proceeds so paid to M an action of *assumpsit* was brought against him by D and W—*Held*, that the voyages from *Baltimore* to *St. Thomas's*, from *St. Thomas's* to *Aux Cayes*, and from *Aux Cayes* back to *St. Thomas's*, were illegal, being contrary to the acts of congress interdicting commerce with any port or place within the territory of the *French* republic, or the dependencies

thereof, or with any place in the *West Indies*, or elsewhere, under the acknowledged government of *France*; and that D and W could not recover. *Stewart et al. v M'Intosh*, 236

2. K and H of *New Orleans* having purchased a quantity of cotton for K and C, drew bills on them for the amount, which being protested for nonpayment, K and H were obliged to pay the amounts thereof, with 10 per cent damages, according to the usage and custom prevailing in *New Orleans*. They afterwards brought their action against K and C for the amount paid by them for the cotton, the suit was referred, and the arbitrators, not taking into consideration the 10 per cent damages, awarded the amount to be paid by K and C to K and H, for which a judgment was rendered, which was afterwards satisfied. K and H afterwards brought an action against K and C, to recover the 10 per cent damages—*Held*, that they were not entitled to recover. *Kenner & Henderson v Kennedy & Cox*, 240

3. The assignee of a debt resting on an open account, may, under certain circumstances, support an action of *assumpsit* thereon in his own name against the debtor; as where T was indebted to J and C on open account, and C transferred his interest therein to J, who gave notice thereof to T, and he assumed payment thereof to J. *Allstan's Adm'r. v Contee's Ex'r.* 351

4. In 1812 (during the war between the *U. S.* and *G. B.*) C and S shipped a parcel of flour on board of a vessel on a voyage from *Baltimore* to *Lisbon*, to be sold for them by W, the captain. The vessel was captured by a *British* ship of war, and carried into *Jamaica*, where the goods in question, the property of C and S, were restored to W, as his private adventure, who obtained the money for which the goods were sold, and to recover which C and S brought an action of *assumpsit* against W. To defeat the claim W offered to prove that the vessel was owned by B, and freighted from him by W and S, who obtained a *British* license to protect the ship and cargo—*Held*, that as between the parties to an illegal transaction, no suit will lie by one against the other; and if the plaintiffs did know that the vessel was covered by a *British* license, they would be so far considered parties to an illegal transaction, as to be thereby rendered incapable of sustaining this action; otherwise, if they had no knowledge of the fact: *Chappell & Stansbury, v Wysham*, 560

5. —— The doctrine of constructive knowledge, on which prize courts have condemned the property of innocent claimants, is one of policy, and adopted for the purpose of preventing illicit trade, violation of allegiance, &c. But as between a principal and his agent, where the latter seeks to shelter himself behind his own illegal act, the same reason does not hold, and the law will not, on the principle of constructive notice, work injustice, by subjecting the principal to the consequences of an illicit transaction, although he had no participation in it, to enable the agent, the actual violator of the law, and entitled to no favour, to take advantage of his own wrong, and to defraud his employer. *Ib.*

6. L and G entered into an agreement in February 1814, viz. "L has agreed to furnish G with $15,000 amount of *U. S.* loan, to be furnished out of the first loan, at $88 for $100 in stock." And afterwards in March 1814, another agreement was entered into between them, and signed by G, viz. "In compliance with an agreement made between L and myself, I hereby authorise and empower him to subscribe in my name, and for my use, to the loan shortly to be brought forward by the *U. S.* for the present year, to amount of $15,000, which amount he engages and secures to me shall not cost to me any higher rate than the loan of 15 millions was obtained at; and I hereby engage to make all payments on the said stock of $15,000, he also engaging to me that it shall be rated and cost me, as did that of the 18 millions loan to the original subscribers. In case any difference of cost of the said $15,000 more or less, than that to the 16 millions loan, such difference of cost shall be paid in money by the losing party. L is also authorised to make good his contract with me by the purchase of stock of any of the former government loans, and I contract on my part to make payment for such stock on the same days and proportions of instalments on which the new loan is settled and demanded." Upon the last mentioned agreement L brought an action of *assumpsit* against

G, averring in his declaration, (having sundry counts,) that L did in the name of G, subscribe for $15,000 of the loan of 1814 at $80 for each $100, being $8 for each $100 less than the loan of 16 millions cost the original subscribers, making a difference of $1364, for which last sum the action was brought. Under the act of Congress of March 1814, the Secretary of the Treasury in May 1814, offered to borrow 10 millions, part of the 25 millions authorised to be borrowed by that act. L subscribed for G $15,000 at the rate of 88 for 100, and obtained certificates of scrip for $17,645 50, to which was annexed a condition, that if any part of the 25 millions should be borrowed upon terms more favourable to the lenders, the benefit of such terms would be extended to the persons who may *then hold* the scrip certificates or certificates of funded stock. G paid the several instalments on the loan, and L delivered to G the certificates of scrip. In August 1814 a further subscription for 6 millions of dollars was proposed by the secretary of the Treasury, and three millions subscribed for at $80 for every $100. G being the holder of the scrip certificates, applied for and obtained certificates of funded stock thereon, for the further sum of $1704 50. The county court gave judgment that L was not entitled to recover. On appeal, *reversed*—Also held, that the declaration (to which objections were made,) was sufficient. *Ridgely v Riggs*, 358

See Agent 1, 2, 3, 4, 5.
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—— Bank & Bank Stock 1.
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—— Limitation of Actions 9, 11, 12.
—— Promissory Note 5, 6.
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ATTACHMENT.

1. A declaration need not be filed in a case against garnishees, who appear to, and contest an attachment on warrant, if a short note is filed at the time of issuing the *capias* sued out with the attachment. *Smith, et al. v Gilmor, et al. Garn. of Willink, et al.* 185

2. Where the certificate of a clerk to an affidavit, on which a warrant was founded, directing an attachment to issue, stated that W D "is one of the judges of the court of common pleas for the county of *Suffolk* in the commonwealth of *Massachusetts*, duly qualified and acting in that capacity, and that full faith and credit ought to be given to his legal attestations in court and out, in his said capacity"—*Held*, that as it did not appear by the certificate of the clerk that the judge had authority to administer an oath as directed by the act of 1795, *ch.* 56, *s.* 2, the proceedings were defective. *Prentiss & Carter, Garn. of Story v Gray*, 192

3. Whether or not the following are such legal defects in the affidavit, and warrant directing an attachment to issue, as to defeat the attachment? 1. The affidavit did not allege that the plaintiff was a citizen of the state of *Massachusetts*, or of any particular state, but that he was of *Boston*, merchant, a citizen of the *United States*. 2. The plaintiff did not swear that he produced the note on which the debt was founded, but it was merely recited by the judge that the note was produced. 3. The warrant of R G, on which the attachment issued, did not state, nor was it set forth that he was a justice of the peace. *Ib.*

ATTESTATION.

See Evidence 16.
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ATTORNEY AT LAW.

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See Plots.
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AUTHENTICATION.

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AUTHORITY.

See Evidence 22.
—— Letters of Administration.

AVERMENT.

See Evidence 4.
—— Warranty 3.

AWARD.

See Assumpsit 2.

B.

BANK & BANK STOCK.

1. J B being indebted to the *M. Bank*, for loans of money to the amount of $7,900, and being the owner of 380 shares of stock in that bank, upon which all payments previously required by the bank had been made to the amount of $7,600, did at the request of the bank empower H W, the president of the bank, to transfer the 380 shares, who made the transfer to himself, in trust for the bank, to secure the payment of the above $7,900, and interest due thereon. The bank, agreeably to their charter, afterwards called on the stockholders to pay an instalment of $5 on each share of stock by the 1st of April 1811, which instalment J B failed to pay. H W, on the 27th of March 1812, by direction of J B, transferred the 380 shares to N S, and J B did then pay to the bank $7,900, with all interest then due. The bank declared two dividends between the 1st of April 181', and the 27th of March 1812. To recover the amount of the said dividends J B brought an action of *assumpsit* against the bank—*Held*, that J B, by his neglect to pay the said instalment of $5, forfeited his claim to the two dividends declared by the bank, and that he had no right to sustain the action. *Marine Bank of Baltimore v Biays*, 338

See Corporation 1.

BANK CHECK.

1. A check payable to bearer passes by delivery; and the bearer of it may sue on it as on an inland bill of exchange, and is entitled to recover in an action on it as such, and for money lent and advanced. *Woods, et al. v. Schroeder*, 276

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See Evidence 30.

BILL OF EXCEPTIONS.

1. The *defendant* having prayed the court below to direct the jury on particular points, and the court, being divided in opinion, only two judges being present, refused the prayer, to which refusal the plaintiff and defendant both excepted, according to the act of 1778, *ch.* 21. On appeal by the plaintiff—*Held*, that he had a right to the benefit of his exception. *Smith et al. vs. Gilmor, et al. Garn. of Willink, et al.* 177

See Court of Appeals 1.

BILL OF EXCHANGE.

1. W T drew a bill of exchange, dated the 27th of April 1807, on W L of *Liverpool*, in *England*, in favour of T C, payable 60 days after sight, which bill was, on the 6th of June 1807, presented for acceptance and refused, and so noted by a notary public, but no protest was ever made for non acceptance. W L at that time and afterwards, and on the 8th of August 1807, when the bill became due, had funds in his hands belonging to W T more than sufficient to pay the bill, and he was in good credit up to the 8th of August 1807, when he became a bankrupt. The bill was not presented for payment, and no demand of payment from W L, and no protest for nonpayment were made until the 17th of November 1807. No notice was given to W T of the nonacceptance, and the nonpayment was not made known to him until some time in 1808. On the 17th of August 1807, W T being much embarrassed in his commercial concerns, but having very considerable property in ships, &c. executed certain bills of sale in trust, &c. and on the 11th of September 1807, he executed one on the ship *O* to T C, in trust, &c. On the 20th of September 1808, he satisfied the first mentioned bills of sale, and received reconveyances. T C about that time pressed W T to settle an account, he claiming a large balance to be due to him, in which the bill of exchange was an article of charge, together with interest, damages and cost thereon. On the 27th of September 1808, the said account was settled, and W T paid to T C in cash, and notes which were paid, the balance due on the

said account. T C had declared to W T, before the settlement and payments, that he would not release his right under the deed of the 11th of September 1807, unless W T would settle the said account, and pay or secure the balance to be paid. In an action by W T against T C, for money had and received—*Held*, that if W T, at the time of making the settlement of the 27th of September 1808, was ignorant of the fact that the bill of exchange had not been protested for nonacceptance, then the whole settlement was formed in mistake, and is not obligatory on him; or if he was then apprized of the fact, but made the settlement, and gave the notes in order to induce T C to relinquish his said lien on the ship *O*, which T C otherwise refused to do, then the settlement, payment and notes, were not voluntary, and do not bind W T. That if the settlement was made by W T under an ignorance of the fact of non protest of the bill, or for the purpose of inducing T C to relinquish his said lien, which otherwise he refused to do, and that in the settlement the cash payment then made was intended by the parties to apply to the said bill, then W T was entitled to recover back so much of the said money as was paid on account of the bill, except that proportion of the bill which was received by him of W L's estate. And if in the settlement, the notes given were intended by the parties to apply to the said bill, and that before the time of paying the notes, W T was still ignorant of the fact that the bill had not been protested for nonacceptance, then the payment of the notes was by mistake, and did not bind W T. And if the notes were intended by the parties to apply to the said bill, and at the time of taking them up W T was apprized of the fact that the bill had not been protested for nonacceptance, but that he so took them up for the sole purpose of inducing T C to relinquish his lien on the ship, then the payment of the notes was not voluntary, and did not bind W T. *Chase v Taylor*, 54

2. —— If W T, after he was informed of the irregularity in the protest of the bill of exchange for nonpayment, and of the nonprotest for nonacceptance, and had taken up the bill, made a claim against the estate of W L therefor, and it was allowed by the commissioners of W L's estate, and a dividend allowed, and received by W T, it will not prevent him from recovering from T C. *Ib.* 61

3. No evidence can be given of the protest of a foreign bill of exchange for nonacceptance, without producing the protest itself, or a copy thereof from the books of the notary, or proving that the said books and the original protest are lost, *Ib.* 60, 61.

See Bank Check 1.

BILL OF LADING.

1. A bill of lading is an assignable instrument, and it is a common mode of transferring the cargo of a vessel. *Owings & Cheston v Nicholson & Williams*, 68, 107

See Consignee & Consignor 1, 2.

BILL OF SALE.

1. It is in the power of a debtor to sell and convey his property, and to deliver possession, and such sale, if *bona fide*, is valid. *Hambleton's Ex'r. vs Hayward*, 443

2. The execution of a bill of sale of personal property, acknowledged and recorded agreeably to the act of 1729, *ch* 8, vests in the party the same interest he would have obtained, if the possession had accompanied the transfer of the right. *Ib.*

3. If a bill of sale is executed *bona fide*, the possession of the property by the vendor, of itself, under the act of 1729, *ch* 8, will not render it fraudulent and void. *Ib*

BINDING EXPRESSIONS.

See Grant.

BOND.

See Subscribing Witness.
—— Non Est Factum.
—— Trover 1.

BOUNDARIES OF LAND.

See Calls.
—— Commission & Commissioners 1.
—— Grant 12.

BRITISH LICENSE.

See Assumpsit 4.

C.

CALLS.

See Grant.

CAUSE OF ACTION.
See Assignment 1.
—— Limitation of Actions 6.

CERTIFICATE.
See Attachment 2.

CHANCERY.
See Court of Chancery.

CHARTER PARTY.
1. The ship owners have a right to make any other contract they please with the shipper, varying or annulling the charter party, in relation to their respective parts of the cargo. See FREIGHT 2, and *Mactier v Wirgman, et al.* 568
See Freight 1.

CHEAT.
See Fraud 2.

CHECK.
See Bank Check.

CHOSE IN ACTION.
See Assignment 1.

CITIZEN.
See Attachment 3.

CLERICAL ERROR.
See Judgment 2.

CLERK.
See Attachment 2.

CO-DEFENDANT.
See Answer in Chancery 1.
—— Court of Chancery 19, 20.
—— Evidence 33.

COMMISSION.
1. A R, J H and D S, were by the will of A M constituted his executors, and they obtained joint letters testamentary on his estate. An account was settled with the orphans court, and a commission of 7½ per cent allowed to the executors, which sum was retained by A R, who refused to pay any part thereof to D S, upon the ground that the business of the administration of the estate was done and transacted by himself only. In an action for money had and received, brought by D S against A R—*Held*, that D S was entitled to recover, and that the jury ought not to make any abatement from his demand, because of A R's having solely done and transacted the business of the administration. *Richardson's Adm'x. v Stansbury*, 275
See Executors & Administrators 1.

COMMISSION & COMMISSIONERS.
1. To prove the location of a tract of land called *C*, a commission for marking and bounding that tract, and the return thereof, were offered in evidence. The commissioners certified in their return to the commission, that they had taken the depositions of witnesses, and caused a survey to be made of the land, and settled and adjusted the location thereof, and marked and bounded the same; but after duly considering the evidence, &c. they could not agree in opinion, and therefore made no establishment or further return thereof—*Held*, that the commission and return were not evidence. *Green v M'Clellan*, 201
2. A commission to make partition of lands, and the return thereto, not permitted to be read in evidence, the commission being defective, inasmuch as the oath of the commissioners was not annexed to it, and the commission and return did not appear by evidence to have been ratified by the court. *Massey v Massey's Lessee*, 141
See Land Commission.
—— Special Authority 1.

COMMON CARRIER.
1. Action against H and B, as common carriers of goods, &c. transported partly by land and partly by water, in packets and waggons, from *Baltimore* to *Philadelphia*, by the way of *Elkton* and *Christiana*, brought for negligence, &c. in the transportation of flour, &c. Much evidence was given of the badness of the roads and destruction caused to the flour at *Christiana*, (where it was delivered to be taken therefrom in packets,) by a considerable fresh, occasioned by a heavy fall of rain, which overflowed the place where it was deposited. On various questions submitted upon the evidence, the court directed the jury, 1. That if the delay in the land transportation was altogether owing to the founderous condition of the public roads, H and B were excusable; but if it was to be attributed to their taking more merchandize than they had power or means to carry in the usual course of transportation, then they were inexcusable, and chargeable for the delay which had been so occasioned. 2. That the testimony offered by H and B, in relation to the fresh that happened at *Christiana*, was not to be regarded at all, because it did not legally excuse them

from answering for any damage the flour had sustained by reason of the fresh. 3. That the testimony by them offered in relation to the damage which the flour sustained on board the schooner F, did not legally excuse them from answering for the damage thus sustained on board of the schooner, and ought therefore to be wholly disregarded. 4. That if 97 barrels of the flour, shipped on board the sloop L, was sent to *Lamberton*, beyond its original destination, without the orders or authority of the plaintiff or his agent, H and B were liable; but not otherwise. 5. That if the delay in the whole transportation was occasioned by the acts of God, such as adverse winds, the founderous situation of the roads, unusual low tides, or the like, H and B were excusable. But if the delay was occasioned, or in so far as it was occasioned, by H and B taking a greater quantity of commodities than they had the means of transporting, or by the unskilful navigation of the vessels, or any other circumstances which could not be deemed the immediate and distinct act of God, or the enemies of the state, then H and B were chargeable for such delay. 6. That if the agent of H and B did call for instructions at *Philadelphia*, on the agents of the plaintiff, relative to the sending the 97 barrels of flour to *Lamberton*, and received none, then H and B were justified in carrying the flour to *Lamberton*. 7. That the plaintiff was nevertheless entitled to recover; because such new engagement to carry the flour to *Lamberton* was no alteration or modification of the contract declared on, but an excuse for the nondelivery of the flour at *Philadelphia*, which it was proper should come from H and B, and was not necessary to be set out in the plaintiff's declaration. *Boyle, et al. v M'Laughlin*, 291

2. —— Certain declarations of H, made (when the plaintiff was not present, and having no knowledge thereof,) to persons applying to have goods transported, &c. not admissible in evidence. *Ib.*

3. The defendants, being common carriers, and proprietors of a line of stage coaches, for the transportation of passengers and goods, &c. for hire, published in various newspapers, the time when the stages would start from and arrive at the respective places from and to which they ran, in which publication were the following words: "Fare and allowance of *baggage* as usual. All *baggage* to be at the risk of the owners thereof. All the *baggage* over 20 lbs. will hereafter positively be charged, and be at the risk of the owners thereof." In an action against them for negligence in not delivering a case of sen-shaws—*Held*, that if the owners of stage coaches, which carry not only passengers and their baggage, but goods which the owner does not accompany, can by their publications exempt themselves from their liability, which the court did not mean to decide, then such publications should in that respect be plain and explicit. That in this particular case the defendants' advertisement was in doubtful and ambiguous language, and they were as responsible for the goods, as if no advertisement had been published by them. *Barney v Prentiss & Carter*, 317

COMPETENT WITNESS.

See Court of Chancery 12.
—— Evidence 2, 31.
—— Promissory Note 3.

CONCLUSIVE EVIDENCE.

See Judgment 3.
—— Will 1.

CONCLUSIVE JUDGMENT.

See Court of Appeals 1.

CONDITIONAL PROMISE.

See Limitation of Actions 9.

CONSIDERATION.

See Guaranty 3.
—— Purchase & Purchaser.
—— Trust & Trustee 3, 5.
—— Warranty 3.

CONSIGNEE & CONSIGNOR.

1. J M, being the owner of certain goods, on the 9th of January 1807, shipped them at *B*, to be carried to *C*, for his sole account and risk, and consigned to J O, as his agent and supercargo, for sale. The captain of the vessel on the same day signed three bills of lading, one retained by J M, one delivered to J O, and the other to the captain, with an affidavit of J M, made the next day, with the knowledge of J O, that he was the owner of the goods. Before the 10th of January 1807, it was agreed between J M and J O, that the latter

was to sail as the consignee and supercargo of the goods; and it was agreed in writing that the goods should be considered on their joint account, that is two thirds to J M, and the other third to J O. After the execution of the agreement, and on the same day, it was agreed between J M and J O, that in consideration that J O would become an endorsor on sundry promissory notes, about to be given by J M to the persons of whom he had purchased a part of the goods, J O should retain and have a lien on the whole of the goods, and the proceeds arising from a sale thereof, to reimburse and indemify him. J O did endorse such notes, and paid them, J M becoming insolvent, and failing to do so. The vessel sailed on the 13th of January 1807, and arrived at *C*, and the goods were delivered to J O, who sold them, and invested the proceeds in a return cargo, which he shipped on board the same vessel for *B*, the captain giving to J O a bill of lading and manifest, stating that the goods had been shipped for the joint account and risk of J M and J O, and to be delivered to J M and J O, or their assigns. It was alleged that the bill of lading was originally made out consigning the goods to J M alone, and afterwards, and with different ink, the words *"and J O"* were interlined, and the word *"his"* altered into the word *"their."* On the 2d of March 1807, J M applied to P K for the loan of his promissory notes, which P K did loan to him; and to guarantee P K against any loss, J M assigned to P K the first mentioned bill of lading, the invoice and policy of insurance for the goods. Before the return of the vessel to *B*, P K had been obliged to pay the notes he had loaned to J M. P K had no knowledge of the agreement between J M and J O at the time of the assignment of the bill of lading, &c. On the arrival of the vessel at *B* with the return cargo, on the 22d of May 1807, the cargo was delivered to J O, who bonded for and paid the duties thereon to the *U S.* An action of replevin was brought by P K and the goods were replevied out of the possession of J O—*Held*, that P K was not entitled to recover. *Karthaus v Owings*, 263

2. —— On a bill filed in chancery, it was decreed, on the above facts, that J O, as supercargo and consignee of the outward cargo, and in virtue of the verbal and written agreements, had a right to retain the inward cargo, and had a lien thereon to reimburse himself for all advances made by him, and to satisfy any balance which might be due to him on a final adjustment of the transactions in trade between him and J M. That J O, in making the alteration in the bill of lading, did not act fraudulently, nor did he acquire any new rights thereby. He had a right to stop the goods *in transitu*, *Ib.* 267

3. —— *Quere.* What would have been the situation of the parties if there had been no agreement? *Ib.*

See Assignment 2.

CONSTRUCTION.

See Agent 1, 2, 3, 4, 5.
—— Assumpsit 6.
—— Charter Party 1.
—— Common Carrier 3.
—— Conveyance 3, 4, 5, 6.
—— Court of Chancery 13.
—— Freight 1, 2.
—— Grant 1, 5, 8, 9, 11.

CONSTRUCTIVE NOTICE.

See Assumpsit 4.
—— Principal & Agent.

CONTRABAND TRADE.

See Assumpsit 1, 4, 5.
—— Insurance 2.

CONTRACT.

See Agreement.
—— Assumpsit 6.
—— Charter Party 1.
—— Common Carrier 1.
—— Evidence 34.
—— Freight 1, 2.
—— Trust & Trustee 4.
—— Wager.

CONVENTIONAL TRUST.

See Trust & Trustee 4.

CONVEYANCE.

1. Where a sale of lands was made by a trustee appointed for that purpose by a decree of the court of chancery, directing him, on payment of the purchase money, to convey to the purchaser and his heirs, the lands sold, and the purchaser died without having obtained a conveyance of the land from the trustee, who made the conveyance to the heirs of the purchaser, the purchase money being paid—*Held*, in an action of ejectment

to recover the lands, that the conveyance might be read in evidence. *Massey v Massey's Lessee*, 141

2. On a sale made by a trustee appointed by decree of the court of chancery, which is ratified, the legal estate, on the death of the purchaser, the purchase money being paid, does not vest in the heir at law of the purchaser, without a conveyance from the trustee. *Ib.* 143

3. J H by deed of bargain and sale, granted and conveyed to N R, a lot or parcel of ground part of *Lun's Lot*, and located it as "beginning for the same at the S W corner of E and G streets, and running thence S binding on E street, 150 feet to C alley, thence W binding on C alley continued, 300 feet to P street, thence N binding on P street 150 feet to G street continued, *which street bounds on the S. the square intended for public uses*, thence E binding on said street from the said square to the beginning." On a bill filed in chancery by N R against J H for an injunction to restrain J H from applying to private uses the square intended for public uses, but should be obliged to keep it open for public purposes—*Held*, that it was the plain intention of the parties, to be collected from the words of the deed, that the lot therein described should pass, and all J H's right and interest therein, and nothing else. *Howard v Rogers*, 278

4. In the construction of a deed the intention of the parties is to prevail, if not incompatible with some rule or maxim of law. The intention is to be collected from the words of the deed, as expressive of and defining the meaning of the parties. *Ib.*

5. —— The deed is to be construed most favourably for the grantee, if there is any doubt about the meaning of the parties. *Ib.*

6. Parol evidence is not to be admitted, nor extraneous circumstances introduced, in the exposition of deeds, except in the single instance of a latent ambiguity. *Ib.*

See Court of Chancery 30.
—— Ejectment 5.
—— Trust & Trustee 3, 4, 5, 6.

COPY.

See Evidence 5, 6, 34.
—— Plot 1.
—— Protest 1.

CORPORATION.

1. In an action against an incorporated bank, the writ described the defendants by their corporate name of *The President and Directors of the Marine Bank of Baltimore*. The declaration was against *The said Bank;* the plea was that the *Marine Bank* did not assume, and the verdict and judgment used the corporate name—*Held*, on objections made to the declaration, that it was sufficient. *Marine Bank of Baltimore v Biays*, 338

See Bank & Bank Stock 1.

CORRESPONDENCE.

See Evidence 3, 39.

COSTS.

1. Whether or not a judgment for costs taxed in *tobacco*, since the act of 1806, *ch.* 41, § 5, is not erroneous? *Quere. Grantz & Fralick v The State use of Crist, et ux.* 121

COUNTERLOCATION.

See Grant 1.

COUNTER SECURITY.

See Executors & Administrators 2.

COUNTY COURT.

See Jurisdiction 3.

COURSE & DISTANCE.

See Grant 11.
—— Location of Lands.

COURT.

1. Where a variety of contested facts were laid before the jury, and on the consideration of them they had to decide whether a promissory note had been tainted with usury in its inception or negotiation, it is not for the court to advise them as to the conclusions they are to draw the one way or the other. *Burt v Gwinn*, 507

2. It is sometimes the duty of the court to decide the law upon facts, but it is after they are well ascertained by admissions or otherwise, and not while they are unsettled between the parties. *Ib.*

See Grant 9, 11.
—— Jurisdiction 3.
—— Jury.
—— Law & Facts.

COURT OF APPEALS.

1. Where the judgment of the county court was reversed by the court of appeals, and the proceedings were

remitted, with a writ of *procedendo* to the county court, and on a new trial that court gave judgment on the same question, in accordance with the judgment given by the court of appeals—such judgment, on an appeal, must be affirmed. *Hambleton v Tenant*, 440
Clerklee v Mundell's Lessee, 497

COURT OF CHANCERY.

1. B H filed a bill in chancery in 1805 against the heirs of R R, on a bond executed by R R in 1789, the personal estate being insufficient. The heirs, by their answer relied on the act of limitations, and to prevent the operation of that act, B H exhibited a judgment obtained by him in 1802 on the administration bond executed by the administratrix of R R, he having previously obtained a judgment against the said administratrix on the bond executed to him by R R—*Decreed*, that the bill be dismissed. *Harwood v Rawlings's Heirs*, 126
2. A bill in chancery charged that the complainants, by letter, instructed the defendants, as their agents, to cause an insurance to be effected for them on a vessel then on a voyage, &c. which the defendants neglected to do, and the vessel was lost. The prayer of the bill was that the defendants discover on oath the matters resting in their knowledge, &c. and that they might be decreed to pay to the complainants the sum of money so by them directed to be insured on the vessel, with interest, &c.—*Held*, that the relief prayed by the bill is a matter not properly cognizable in a court of equity; and that that court had no jurisdiction further than to compel the discovery, which forms one of the objects of the bill, which being obtained the complainants ought to be left to their remedy at law. *Taylor & Warren, v Fergusson & Robertson*, 46
3. E and S, being entitled as tenants in common to a tract of land, and a ferry thereon, the ferry then held by S alone, not claiming it exclusively, but receiving and holding the whole profits to discharge a debt alleged to be due to him from E, in order to enforce an agreement before then entered into between them for a division of the land, and for an account of the profits of the ferry, and to suppress another ferry set up by S near the common ferry, E filed his bill in chancery against S—*Decreed*, that the agreement be enforced, &c. and that S account with E for one half of the profits of the ferry from the time he took, and so long as he had retained the whole profits, and also account relative to all debts existing between them. An account being stated, charging profits to the 12th of April 1799, with interest to the 31st of January 1800—*Decreed*, that S pay to E £776 15 6, with interest from the 31st of January 1800; that the parties respectively convey to each other a certain moiety of the tract of land, &c. according to the agreement; and that S permit E to receive weekly, one half of the profits of the ferry, and suppress the ferry by him set up, &c. On an appeal this decree was in November 1802 *reversed* in part, and it was decreed that S be allowed for one half of the improvements erected on the land, and for the difference of soil between the respective parts of the land. *Norwood v Norwood*, 112
4. —— E in June 1800 filed a *second* bill against S, claiming profits of the ferry from the 12th of April 1799, and *referred* to the proceedings in chancery on his former bill as having established his right to a moiety of the profits—*Decreed*, on the 2d of June 1802, that S should pay to E £1427 11 6, with interest, &c. On an appeal, this decree was in June 1804 *reversed*, there being no evidence to support the decree, the proceedings referred to not having been exhibited; and decreed that the chancellor dismiss the bill without prejudice to the equity of E, if any he had. *Ib.* 116
5. —— On the 7th of December 1803, E filed a *third* bill against S, stating the decrees that had then passed, establishing his mutual right to the ferry, and claimed an account of the increased profits. An account of the profits was taken by the auditor from the 12th of June 1799 to the 30th of June 1804, amounting to £3485 2 3, including interest to the 12th of April 1806. On the 31st of July 1804, E obtained possession of the ferry, and after then received the whole profits. S on the 10th of December 1807, claimed to have the amount of profits received by E deducted from the amount stated to be due by the auditor. He also objected to the including in that account the profits

comprehended in the reversed decree, which reversal he had relied on in his answer as a bar to all profits within that period; also to all the profits charged three years prior to the filing the last bill. The auditor's report was confirmed, and *Decreed*, that S pay to E £3485 2 3, with interest from the 12th of April 1806, From this decree S appealed.

On the 29th of December 1807, S filed a bill against E, claiming profits of the ferry from the 31st of July 1804, to be allowed by way of discount out of the amount of the last above mentioned decree, which injunction was granted; and on motion of E to dissolve the injunction, an account was ordered to be stated so as to allow S by way of discount the amount of a judgment obtained at law by R D for the use of S against E; and on the account being so stated—*Decreed*, that the injunction be dissolved, provided that E should not execute at that time for more than £2380 5 2; and an injunction was ordered suspending execution on the judgment at law until further order. On the bill by S against E, the amount of the decree obtained by E against S for £3485 2 3, being deducted from the amount due to S for profits of the ferry from July 1804 to June 1810, and the amount of the judgment of R D for his use against E—*Decreed*, that E pay to S £211 12 3, with interest, &c. From this decree E appealed. On the first appeal by S the decree was *affirmed*, with costs; and also decreed that E be perpetually enjoined from taking out execution on that decree, except for the costs on the appeal, and that S be perpetually enjoined from taking out execution on the judgment at law, above referred to, the amounts of the decree and judgment being settled in the case of S against E; and in that case on the appeal by E, the decree was affirmed, with costs. *Ib.* 116, 120

6. A bill was filed in the court of chancery by J M, stating, that being the owner of a number of shares of stock in a bank, on the marriage of her daughter to J L, and with a view to advance him by making him appear to be the owner of that stock, she caused them to be transferred to him in 1805, under a private agreement that she should receive the dividends during her life, and if she died before her daughter, the stock was to belong to her daughter, subject to her sole and absolute use and disposal. In 1806 J L, about to purchase a house and lot, solicited J M, to which she consented, that the stock should be sold to raise money to aid him in paying for the house and lot, he promising to convey the premises to secure to her and his wife, the money the stock should bring, thereby to change her right to the stock into a lien upon the house and lot to an equal amount. The stock was sold, and J L received and applied the proceeds in part payment of the house and lot; and having paid the whole purchase money, received a conveyance therefor in August 1806. J L, though applied to for that purpose, refused to perform his promise, and after the death of his wife, he positively refused either to pay the amount of the money produced by the sale of the stock, or to give a conveyance on the house and lot—*Decreed*, that J L should pay to J M the sum of money received for the stock, with interest, &c. and if not paid by, &c. the house and lot should be sold, &c. The money not being paid, the house and lot were sold in April 1811, and the sale ratified. Before the sale and ratification thereof, W M petitioned the chancellor, stating that at the solicitation of J L he had in 1807, 1808 and 1809, endorsed for him sundry promissory notes, under an agreement that if they were not regularly taken up by J L he would give to W M a mortgage on the above mentioned house and lot. W M was compelled to take up the notes, and J L in July 1809 executed to W M a mortgage of the house and lot, according to the engagement above mentioned. When W M endorsed the notes for J L, he had no knowledge that any person had any claim either legal or equitable on the house and lot. In February 1810 J L gave an absolute deed to W M for the house and lot. When the mortgage and deed were executed, W M is supposed to have had knowledge of the lien of J M. J M, before filing her bill against J L, brought suit against him at law, and in March 1809 obtained a judgment for the amount of her claim for the stock. W M by his petition prayed a suspension of the sale, &c. The sale was not suspended, but the chancellor intimated that the sale when made would be subject to the ratifi-

cation of the court, and W M would then be heard, &c. He afterwards *decreed*, that the petition be dismissed. On appeal, the decree was *affirmed*. *M'Mechen & Sullivan v Maggs*, 132

7. A judgment obtained against an executor or administrator of a deceased person, is not evidence on a bill filed in chancery against the heirs or devisees of the deceased, for a sale of the real estate of such deceased. *Duvall et al. vs Green*, 270
Harwood vs. Rawlings's heirs. 126

8. Where voluntary conveyances were decreed to be cancelled, vacated and annulled, being fraudulent and void as to creditors. *Farrow et al. vs Tackle*, 271

9. Where it was unnecessary to make an assignor and a trustee parties to a bill in chancery, *Ib.*

10. J E H, by deed of bargain and sale, conveyed to N R a lot of ground described "as beginning for the same at the S W corner of E and G streets, and running thence, &c. to G street continued, *which street bounds on the S the square intended for public uses*, thence binding on said street from the said square to the beginning." On a bill filed in chancery by N R against J E H, for an injunction to restrain him from applying to private uses, the square intended for public uses, but that he should be obliged to keep it open for public purposes—*Held*, that it was the plain intention of the parties, to be collected from the words of the deed, that the lot therein described should pass, and all J E H's right and interest therein, and nothing else. *Howard vs. Rogers*, 278

11 — Parol evidence is not to be admitted, nor extraneous circumstances introduced in the exposition of deeds, except in the single instance of a latent ambiguity, *Ib.*

12. R and K being unable to meet their engagements, assembled their creditors, and offered to sell to them, at stipulated prices, considerable property, both real and personal, in satisfaction of their debts, to which their creditors assented, and A, R and G, were appointed trustees to make sale of the property, and R and K conveyed it to them on the above terms. A part of the property, R and K were authorised to sell, and they did contract to sell to T L, one of the creditors, such part, which sale was confirmed by the trustees, and a deed executed therefor to T L. On a bill filed by the trustees against the executrix of T L, to recover the purchase money, or for a sale of the property, they claiming to have a lien on it. *Quere*—Whether or not R is a competent witness? *Lansdale's Ex'x. v Ghequiere*, 257

13. D in 1811, executed a mortgage of certain lease-hold property to F, to secure him as an endorsor of certain promissory notes, and which F, on the death of D, was compelled to pay. The mortgage was not recorded, owing to neglect, and not from any fraudulent intention. F filed a bill in chancery against the administrator, &c. of D, to obtain a decree for a sale of the mortgaged premises to satisfy the amount paid by F—*Decreed*, that the mortgaged premises be sold, &c. On appeal—*Held*, that the question, whether the mortgage was fraudulent, with reference to the creditors of D, did not arise, as the answers did not state the insufficiency of the estate of D to satisfy his creditors, and to that point there is no proof. And *quere*, as to the true construction of the *eleventh* section of the act of 1785, *ch.* 72, and how far the defendant could call to his aid the provisions of that act in a case where the complainant does not seek to record his mortgage, but claims relief under that branch of equitable jurisdiction, which enforces contracts made *bona fide*, and for a valuable consideration? *Woods et al. vs Fulton & Starck*, 329

14. Where new parties are added in a cause in chancery after testimony is taken, the cause shall be heard on bill and answer as to such new defendant—As where a new defendant in his answer admitted all the allegations in the bill, in relation to him, no testimony was wanted, and he could not in any manner be injured or affected by the evidence taken before he became a party, and the making him a defendant, furnished no reason for taking the testimony over again as against the other defendants. *Smith et al. v Baldwin, et al.* 331

15. A sale made by a trustee appointed under a will, set aside on the ground of fraud. *Ib.*

16. Where a bill is filed in chancery for the sale of the real estate of a deceased for the payment of his debts, on the ground that the personal estate has been exhausted, the executor or administrator of the de-

ceased must be made a party. *Tyler et al. v Bowie's Adm'rs.* 333

17. A and B having partnership transactions of several years standing, it appeared by their partnership books that A was indebted to B $97 77 in 1773, $749 81 in 1778, and $374 06 in 1783, amounting to $1221 64. In 1794 A pays to B $1221 10, refusing to pay any interest, and B gives A a receipt in full of all claims. B files his bill in chancery in 1807 against A to recover the interest—*Decreed*, that the interest was recoverable. *Snowden, et al. v Thomas, et ux.* 335

18. A S by her will dated in 1806, directed certain of her real estate to be sold by her executor, and out of the proceeds certain legacies to be paid; and among others, a legacy to one of the children of R H, which child died before the making of the will; and a legacy to a female charity school in *T* county, if there should be such an institution founded on good principles, otherwise to be distributed among the real distressed private poor of *T* county. There was no incorporated school in *T* county of the above description. The proceeds of the real estate sold exceeded the amount of the legacies bequeathed—*Decreed*, that the legacy left to the real distressed private poor of *T* county shall be considered void for uncertainty, and the impracticability of correctly ascertaining the objects of the bequest. That the legacy to one of the children of R H, (the said child having died before the testatrix,) shall be considered as a lapsed legacy, and shall sink into the residuum of the estate for the benefit of the heirs at law of the testatrix. The residuum of the estate remaining in the hands of the executor shall result as real estate to the heirs at law of the testatrix. That the legatees in the will are not entitled to interest on their legacies except from the day on which the executor sold the real estate. *Trippe v Frazier et ux. et al.* 446

19. The answer of one defendant in chancery cannot be read in evidence against a co-defendant. *Hayward v Carroll, et al.* 518

20. If the complainant is interested in establishing a fact by the evidence of a co-defendant, he should examine him as a witness. *Ib.*

21. A complainant in his bill must put in issue whatever he intends proving, otherwise it will not be permitted to be given in evidence. *Ib.*

22. The court of chancery decrees only *secundum allegata et probata*. *Ib.*

23. W W, a trustee appointed by the court of chancery for selling the real estate of A C, sold that part of it called *B* to J A, and took his bond for the payment of the purchase money, with R F his surety, and it was understood that the land was not to be conveyed until the purchase money was paid. J A soon after sold *B* to R G, for the sum he had contracted to pay to the trustee for it; and to accommodate J A, R G with a full knowledge that the trustee had not been satisfied, went on to pay J A the sum he engaged to pay for the land, and received from him an assignment of his claim against A C's estate, which at first was supposed to be greatly more than sufficient to discharge all the purchases J A had made of the trustee. Upon a final settlement of the affairs of A C, his estate proved insolvent, and the creditors being put to a dividend, the sum to be received by R G on J A's assignment, was not adequate to the payment of the purchase money due to the trustee, who withheld the conveyance from R G, to whom he was ordered by the chancellor to convey *B*, on the whole purchase money being paid, and brought suit against R F as surety of J A, on the bond before mentioned. A judgment was obtained against R F for a balance of the purchase money, which, on his filing his bill in chancery he brought into court, and claimed to have the amount paid by R G who had purchased of J A with notice—*Decreed*, that the amount, so recovered against R F, should be brought into court by R G by a limited time, to be paid to R F, or that the tract of land called *B*, or as much as was necessary, should be sold to raise the said sum and interest. *Ghiselin & Worthington v Fergusson*, 522

24. The vendor of a real estate, without deed, has an equitable lien on the land sold, for the payment of the purchase money, into whatever hands it may pass, *with notice* that the contract of sale has not been complied with by the vendee; and the purchaser of an equitable estate *with notice*, is liable to the same equity, stands in the place of, and is bound

to do that which the person he represents would be bound to do. *Ib.*

25. A trustee who sold a tract of land to J A has an equitable lien on the land sold, in the possession of R G, who purchased from J A; and R G, who represents J A, is liable to the same equity, and is bound to do, at least as far as the vendor is concerned, whatever J A would have been bound to do if he had not sold to R G, *Ib.*

26. A man cannot sell more than he has, and when a purchaser of a trustee sells to another, he cannot place him in a more eligible situation than he occupies himself. He cannot, by an act of his, place his surety for the purchase money in a worse situation than he would have been in if the purchaser had not so sold. *Ib.*

27. The chancellor has no authority to decree a deed of manumission to be recorded, where it has not been enrolled within the time prescribed by law. *Wicks, et al. vs Chew et al.* 543

28. G W being appointed by the court of chancery, trustee of the person and estate of J H, a lunatic, it was ordered, with the trustee's consent, that until further order, he should use as his own the property, real and personal, of the lunatic, without accounting for the profits, he undertaking to account for and deliver the same, when called on by the chancellor's order, or in any other legal manner; and undertaking likewise to keep, lodge, clothe, and in every respect maintain the lunatic, &c.—*Held*, that the expenses attending the birth, and raising certain young negroes of the lunatic, as well as certain other charges appearing on the account exhibited by the trustee, and for which he claimed an allowance, are incidental to the trust and possession of the property under it, and therefore cannot be allowed. *Moore et al. v White*, 548

29. Although certain proceedings in chancery are informal and irregular as to the admission of parties to defend a claim improperly exhibited by a trustee against the estate of a lunatic; yet as the decree of the chancellor allowing such claim, if unreversed, would be final and conclusive in its operation on those of the representatives of the deceased lunatic, who have become parties to it—*Held*, that the appeal made by those representatives from the chancellor's decree be sustained, and that the decree be reversed, *Ib.*

30. If a man employs an agent, by parol, to buy an estate, who buys it accordingly, and no part of the consideration is paid by the principal, and there is no written agreement between the parties; he cannot, since the statute of frauds, compel the agent to convey the estate to him. *Dorsey et al. v Clurke, et al.* 551

See Consignee & Consignor 2.
—— Surety 2.
—— Trust & Trustee 1, 3, 4.
—— Will 1.

COVENANT.

1. In covenant on articles of agreement for the nonpayment of rent, brought by B against H—*Held*, that the stipulation on the part of B to find for H two bushels of clover seed, and two bushels of timothy seed, for him to sow on the land, and let H have as much rail stuff and firewood as necessary for the place; also timber, plank, &c. to build a kitchen, was not a dependant covenant, and B need not, in order to entitle him to recover for the rent in arrear, show that every thing stipulated on his part had been performed. *Benson v Hobbs*, 285

2. —— Parol evidence, that there was a subsequent parol agreement between B and H, that two bushels of clover seed, and two bushels of timothy seed, should be bought by H, and deducted out of the rent, not admissible in evidence as a stipulation contained in the articles of agreement, on the part of B to furnish two bushels of clover seed, &c. every year during the continuance of the lease. *Ib.*

See Conveyance 1, 3.
—— Rent 2.

CROP.

See Tenant for Life & Years 1.

D.

DAMAGES.

1. If the principal sum of money due on a protested bill of exchange has been recovered by judgment and satisfied, the damages cannot be recovered in another action. *Kenner & Henderson v Kennedy & Cox.* 240

See Assault & Battery 1.
—— Fraud 2.
—— Sett Off.
—— Trover 4, 5.

DAYS OF GRACE.
See Promissory Note 5.

DEBTOR & CREDITOR.
See Application of Payments 2.
—— Bill of Sale 1, 3.
—— Court of Chancery 8, 18.

DECEIT.
See Fraud 2.

DECLARATION.
1. A declaration need not be filed in an action against garnishees who appear to and contest an attachment on warrant, if a short note is filed at the time of issuing the *capias*, sued out with the attachment. *Smith et al. v Gilmor, et al. Garn of Willink, et al.* 185
2. Where a declaration was held to have sufficiently set out the agreement on which it was founded—See ASSUMPSIT 6, and *Ridgely v Riggs*, 358
3. A declaration in *assumpsit* against an administratrix contained sundry counts on promises made by the defendant's intestate, and a count, stating that the defendant, administratrix aforesaid, after the death of the intestate, accounted with the plaintiff, &c. and upon that account the intestate was found indebted to the plaintiff in, &c. and that *defendant*, in consideration thereof, promised the plaintiff to pay him, &c. *Held*, that as it is not stated that the defendant promised *as administratrix* to pay, her declarations to pay the claim could not disprove her pleas of the act of limitations. Per *Martin* and *Dorsey*, J. *Chapman v Dixon's Adm'x.* 527

See Common Carrier 1.
—— Corporation 1.
—— Issues.
—— Limitation of Actions 11.
—— Promissory Note 5, 6.
—— Trover 1.
—— Usury 1.
—— Warranty 3.

DECLARATION OF TRUST.
See Trust & Trustee 3.

DECLARATIONS.
See Assault & Battery 1.
—— Assumpsit 2.
—— Common Carrier 2.
—— Evidence 3, 18, 20, 29.
—— Limitation of Actions 9.
—— Warranty 2.
—— Will 2.

DECREE.
See Evidence 8.
—— Jurisdiction 2.
—— Trust & Trustee 1.

DEED.
See Conveyance.
—— Grant 8.

DELIVERY.
See Gift 1.

DEMAND.
See Promissory Note 5.
—— Rent 1.

DEMAND & REFUSAL.
See Limitation of Actions 6.
—— Trover 3, 4.

DEPARTURE IN PLEADING.
See Pleading.

DEPENDANT COVENANT.
See Covenant 1.

DEPUTY.
See Evidence 22.
—— Letters of Administration.

DESCENTS.
1. An estate by *purchase*, at common law, and within the meaning of the act of 1786, *ch.* 45, is one acquired by sale or gift, or by any other method, except only that of descent. *Hall v Jacobs, et al. Lessee*, 245
2. The words in the act of 1786, *ch.* 45, "and not derived from or through either of his ancestors," mean "and not by descent." *Ib.*
3. R J died in 1783, having devised certain lands to be equally divided between his three children, J, D and R, and their respective heirs. In 1800 J and R died intestate, and without issue. D died in 1803, intestate, and without issue, leaving no brother or sister of the whole blood, but leaving J J his uncle, (brother of the whole blood of R J,) and E and F his aunts, (sisters of the whole blood of R J.) P, the widow of R J, and mother of J, D and R, intermarried with J H, by whom she had issue J H—*Held*, that the interest in the one third of the land which was vested in D by the will of his father R J, was an estate by *purchase*, and as such, embraced by the act of 1786, *ch.* 45, and on his death descended to his brothers and sisters of the half blood; that his interest in the two thirds of the land which were devised by the same will

to J and R, and which at their death descended to him, was not an estate embraced by any of the provisions of the said act, and descended at the death of D to J J, the brother of R J, to the exclusion of E and F. *Ib.*

DESCRIPTION.

See Conveyance 3.
—— Grant 6, 7.

DEVISE.

1. B M by his will dated in 1806, after devising lands to be sold by his executors, devised as follows: "I give and devise to my brother J M, his heirs and assigns, forever, one half of all those other lands near," &c. "*The remaining half of the lands above mentioned, I give and devise to be equally divided between my two sisters R M and E P, share and share alike.* I give and devise to my dearly beloved wife, and my daughter M M, all the rest of my *real estate*, which I may be entitled to have in law and equity, *which is not devised as aforesaid*, on the following terms: To my wife, during her natural life, she supporting, educating and maintaining, my said daughter, in a genteel and liberal way, until she arrives at the age of 16; then and after that age, my wife to account to her for the yearly value of one half of the said lands, until *the death of my said wife;* then I give and devise the said *land and real estate* to my daughter aforesaid, her heirs and assigns, forever. And I do give and devise the said lands to my dear wife, her heirs and assigns, should my daughter die before my wife, leaving no children" —*Held*, that R M, the sister, took only an estate for life in the lands devised to her. *Vansant et ux. v Money's Lessee*, 313
2. M S possessed of a term of years in a lot of ground, bequeathed it as follows: "I give and devise to my daughter C, the house and lot whereon I now live, all which I give to my said daughter during her natural life, and after her decease, I give the same to the heirs of my said daughter C" —*Held* by *Baltimore* county court, that C was entitled to the whole of the unexpired interest in the term. *Horne, et al. Lessee v Lyeth*, 431
3. The dying without issue generally, is too remote either in a deed or will of personal property. *Johnson v Negro Lish*, 441
4. Where the proceeds arising from lands devised to be sold were considered to result as real estate—See Court of Chancery 18, and *Trippe v Frazier, et al.* 446
5. L S by his will in September 1798, among other things, bequeathed as follows: "As also it is my will and desire that the money arising from the sales of my lands and negroes, and all the residue of my estate, after my just debts are paid, to *be equally divided* between my brother J S, and my brother G S's children—*Held*, that J S took, as a tenant in common, an equal part, and no more, with each of the children of G S; and that if the executor paid over to J S more than such equal part, believing him to be entitled to one half, such payment could not affect the claim of the children of G S, but that they were entitled to recover the same sum that they would be entitled to recover, if J S had received only his own proportion. *Maddox v The State use Swann, et al.* 539

See Court of Chancery 22.
—— Legacy & Legatee.
—— Trust & Trustee 6.

DEVISEE.

See Evidence 19.

DILIGENCE.

See Common Carrier.
— Promissory Note 7.

DIRECTION OF THE COURT.

See Jury.
—— Law & Fact.

DISCHARGE.

See Release.

DISCOUNT.

See Set Off.

DISCOVERY.

1. Where the court of chancery had no jurisdiction of the case more than to grant the discovery, but not the relief prayed by the bill—See Court of Chancery 2, and *Taylor & Warren v Fergusson & Robertson*, 46

DISTRESS.

See Rent 1.

DISTRIBUTEE.

See Legacy & Legatee.

DESTRUCTION.

See Rent 2.

DIVIDENDS.
See Bank & Bank Stock 1.

DOUBLE DESCRIPTION.
See Grant 6, 7.

DOUBLE PLEADING.
See Pleading.

DUE DILIGENCE.
See Common Carrier.
—— Promissory Note 7.

DUPLICITY IN PLEADING.
See Pleading.

DURESS
See Bill of Exchange 1.

E.

EJECTMENT.
1. A grant was located on the plots by the plaintiff in ejectment, as issued to C, D and M, on the 2d of *September* 1732, and at the trial he offered in evidence a grant for the same land to C, M and E, on the 8th *of August* 1735—*Held*, that it might be read in evidence. *Shields's Lessee v Miller*, 1
2. The plaintiff proved by a witness the time when M S was born. The defendant then proceeded to examine the same witness, in order to establish his location made on the plots of a tract of land called *C*, for which he took defence. The plaintiff then offered to ask the witness if he did not own or claim title to the tract of land called *P*, located by the defendant, in order to show that the witness was interested in having the location of *C* established—*Held*, that the plaintiff was at liberty to ask the question of the witness for the purpose of showing that he was interested, and incompetent to give evidence relative to the location of *C*. *Ib.* 5.
3. The true location of a tract of land is a question of fact to be decided by the jury on the evidence, and it is their duty to find the location in such place where, from the evidence, they shall be of opinion the lines thereof were originally run, unless they shall also find from the evidence, the party, insisting on the original location, is prevented by some agreement, by adverse possession, or by some other legal bar, from availing himself of the original location. *Ib.* 7
4. Where the verdict in ejectment was general against the defendant for all the land for which he took defence on the plots, and the judgment was entered by lines described on the plots, which included more land than the defendant took defence for—On appeal the judgment was affirmed. *Easton v Snavely's Lessee*, 17
5. J S by his will in 1790, devised certain lands to his two sons J and D, and his three daughters N, P and B, in trust for his son W, and he authorised the trustees to sell all or any part of the lands in order to buy other lands with the money arising from such sale, for the benefit of his son W, as should appear to a majority of his trustees to be most for his W's benefit; and if his son W should die without lawful issue, he then gave the lands to his above mentioned five children. In 1793 W, J, D and N, sold the lands to J W in fee simple, and on the purchase money being paid, they conveyed the lands to him. When this deed was executed, J, D, W, N, P and B, were all alive and of full age, and N was at that time a *feme covert*, who afterwards died, leaving four children. W died intestate, and without issue, before the death of N. On an ejectment brought by the heir of one of the trustees against J W, for one undivided twentieth part of the lands—*Held*, that he was not entitled to recover. *Selby's Lessee v Williss*, 242
See Conveyance 1.
—— Descents 3.
—— Grant.
—— Limitation of Actions 2.
—— Presumption 1.
—— Verdict 2.

EMBARGO.
See Freight 1.

EMBLEMENTS.
See Tenant for Life & Years 1.

ENCLOSURE.
See Trespass.

ENDORSOR & ENDORSEE.
See Promissory Note.

ENROLMENT.
1. If a deed of manumission of slaves has not been enrolled within the time prescribed by law, the chancellor has no authority to decree that it should be recorded. *Wicks et al. v Chew et al.* 543
See Mortgage 1.

EQUITY.
See Court of Chancery.

EQUITABLE ESTATE.
See Court of Chancery 24, 25.

EQUITABLE LIEN.
See Court of Chancery 24, 25.

ESTATE FOR LIFE.
See Devise 1, 2.
—— Gift 2.

ESTATE TAIL.
See Limitation of Actions 3.

ESTOPPEL.
See Location of Lands 3.

EVICTION.
See Rent 2, 3.

EVIDENCE.
1. A grant of land was located on the plots in the cause by the plaintiff in ejectment, as issued to C, D and M, on the 2d of September 1732, and at the trial he offered to read in evidence a grant for the same land issued to C, M and E, on the 8th of August 1735—*Held*, that it might be read in evidence. *Shields's Lessee v Miller*, 1
2. A witness may be competent to give evidence for the plaintiff as to a particular fact, but incompetent, in the same action, to give evidence for the defendant as to a distinct fact. *Ib.* 5
3. Declarations, explaining the object of writing a letter, admitted to be given in evidence, though offered by the party making them, and by whom the letter was written. *Duvall v Medtart*, 14
4. In an action on an administration bond, executed on the estate of *George W*, the defendant pleaded general performance, and the plaintiff replied non performance, setting forth the death of *George W*, otherwise called *Anthony W*, intestate, and the granting administration, &c. the return of an inventory by the administrators, &c. in the usual form of such replications, describing the deceased throughout as *George W*, otherwise called *Anthony W*. The defendant rejoined that *George W* was not called or known by the name of *Anthony W*. The inventory returned by the administrators was on the estate of *Anthony W*. Evidence was offered that the name *George W* was inserted in the bond by the defendant, one of the sureties therein. The plaintiff offered to prove that the *George W*, named in the bond, was known by the name of *Anthony W*, and that R W and T S, the obligors in the bond, never were executors or administrators on the estate of any other deceased but the one named in the bond, and that the inventory was returned by them as administrators of the deceased mentioned in the bond. And also offered to prove by parol evidence, that the *George W* deceased, mentioned in the bond, and the *Anthony W*, mentioned in the inventory, was one and the same person, and not other or divers; and offered to read in evidence the inventory, stated to be of the goods, &c. of *Anthony W*, and proved by R W and T S, the administrators. The county court refused to permit the evidence to be given to the jury—but on appeal, *reversed*. *The State use of Wilcoxen v Wootton*, 21
5. No evidence can be given of the protest of a foreign bill of exchange for non acceptance, without producing the protest itself, or a copy thereof from the books of the notary, or proving that the said books and the original protest are lost. *Chase v Taylor*, 60, 61
6. Under what circumstances a copy of a private plot of the lands in dispute may be read in evidence. *Carroll et ux. v Smith*, 108
7. If the sales of certain lots of land were made by a plot of the land, the purchasers have a right to hold the lots according to the location which was made on the plot; and evidence cannot be given that the surveyor, when running the lots preparatory to making the plot, run the division, or other lines, different from the lines located on the plot. *Ib.* 130, 131
8. S W purchased a quantity of flour from O and C, for the payment of which he gave to them his promissory note on the 10th of August 1810, payable 85 days thereafter, which flour he shipped to *Martinique* on the 18th of August 1810, consigned to S D, where the vessel arrived on the 5th of October. On the 24th of August, while the vessel was prosecuting her voyage, S W assigned the bill of lading and flour to N and W, to indemnify them as his endorsors on certain promissory notes, which they had paid, being for more than the

value of the flour. S W, when he assigned the bill of lading to N and W, was wholly insolvent, and was discharged as an insolvent debtor under a special act of insolvency passed in November 1810, but he was in good credit when he purchased the flour. About the last of August O and C sent their agent to *Martinique* to seize the cargo of the vessel, for the purpose of securing the debt due to them. He arrived there before the vessel, and caused a suit to be instituted in the court of *St. P*, and when the vessel arrived, the cargo was seized and condemned for the amount due to O and C. After which B N, stating himself to be the agent of N and W, instituted counter proceedings in the said court, to which N and W were made parties, and that court definitely decreed a sale of the cargo for the payment of the claim of O and C, the amount of which was paid by S D in pursuance of the said decree, to the agent of O and C, who paid it over to them—*Held*, that it was competent for the agent to give evidence that the money he received from S D was paid in pursuance of the decree of the court of *St. P. Owings & Cheston v Nicholson & Williams*, 66

9. —— *Held*, also, that N and W were entitled to recover from O and C, in an action for money had and received, the sum of money so by them received. *Ib.* 68

10. —— *Held*, also, that the proceedings of the court of *St. P* were sufficiently authenticated to be read in evidence, it being proved by a witness skilled in the *French* laws, and in the proceedings of the *French* tribunals, that it was authenticated in the manner used and authorised in the territories and tribunals of *France*—The signature thereto of the chief judge of the said court being proved, and the seal affixed thereto being proved to be similar to that used at the same time as the colonial seal of another *French* island. *Ib.* 69, 82.

11. —— *Held* also, that N and W could not offer in evidence by B N, that he had no instructions from them to institute any proceeding whatever on their behalf in *Martinique*, and that on his return, and communicating to them what he had done in the court of *St. P*, they disapproved and disavowed his acts. *Ib.* 83

12. —— *Held* also, that the judgment and proceedings in the court of *St. P.* do not affect the right of N and W to recover from O and C, the money by them received of their agent. *Ib.* 84

13. D and W had an account rendered to them as the owners of a vessel, by M and N. The vessel and her cargo, mentioned in the account, belonged to D and W, who were partners in that transaction only. D was the agent in purchasing the vessel and cargo, and in the transactions relating to the original voyage, and as such he consigned the vessel and cargo to M and W at *St. Thomas's*, from whence she was to have been sent to W at *Jacquemel*, to be under his directions. The vessel was prevented from arriving at *Jacquemel*, and got into *Aux Cayes*, where E, acting for W, loaded her with a cargo of coffee, and sent her to *St. Thomas's*, consigned to N, which cargo is that mentioned in the account; and it was known to M and N that both vessel and cargo belonged jointly and equally to D and W. In an action of *assumpsit* brought by D and W against M, he offered in evidence that before the account was rendered, D was indebted to M and N in $5000, as stated in the account, and in consideration thereof did verbally direct M and N to retain in their hands, out of the proceeds of the vessel and cargo, in discharge of the said debt, the sum of $5000, as charged in the account as retained by them; and to show, that when the direction was given to M and N by D, W was indebted to D in a sum larger than the interest of W in the sum of $5000, M offered in evidence certain accounts between D and W, signed by D. *Baltimore* county court refused to permit the evidence or accounts offered by M to go to the jury. *Stewart, et al v M'Intosh*, 233

14. —— M gave in evidence by E, that he E, by authority from W, on behalf of himself and D, purchased at *Aux Cayes* the cargo of coffee mentioned in the account first above mentioned, and shipped it for their account and risk, the cost and charges of which shipment and cargo he charged to them in an account which he transmitted to W in 1800 soon after the shipment was made; and the first mentioned account was rendered to E by M in 1802, a copy of which he sent to W soon afterwards. That W, both before and after the rendition of the account to E, always al-

leged against the account which E rendered against D and W, that the voyage from *Aux Cayes* to *St. Thomas's* was and ought to be considered as on account of E, but E insisted on his right to recover from D and W, and brought suit against them, and recovered judgment. That M had not been in this state since 1800, until just before the time he was sued in this action. Before the account was rendered by M, W inquired of E if he had ever brought M to a settlement about the business of the vessel? *Baltimore* county court refused to direct the jury, that from this evidence they might find that W assented to the application made by M of the $5000, to the payment of the debt due to M from D. *Ib.* 235

15 —— M then gave in evidence, that after the account of E against D and W, charging them with the costs of the cargo shipped to *St. Thomas's*, was rendered by him to W, W did, on the part of the owners, object to the said charge, and did refuse to consider or accept the cargo as the property of D and W, and insisted that it was the property of E, and refused to pay E for it; and continued so to act and refuse, until after a recovery against D and W by E. That D authorised and permitted M to apply the $5000 to the payment of the debt due from D to M, which direction was without the authority of W. *Baltimore* county court refused to direct the jury, that if they believe all the facts given in evidence by both parties as above set forth, then the conduct and refusal of W operates in law to preclude D and W from recovering. *Ib.* 236

16. On a plea of *non est factum*, the subscribing witness to the bond proved his own attestation, but had no recollection of having seen the defendant sign, seal and deliver the bond; that from seeing his hand-writing, as a witness to the bond, and from his having lived with the plaintiff as a clerk at the time of its execution, and from being in the habit of attesting such instruments for the plaintiff, he believed the defendant had signed, sealed and delivered the bond—*Held*, that the testimony was competent and sufficient to prove the due execution of the bond. *Miller v Honey*, 241

17. The reputation of the neighbourhood, that the mother of a petitioner for freedom was a free woman, is not admissible in evidence. *Walls v Hemsley et al.* 243

18. The declarations of a person since dead, but then holding in slavery the mother of a petitioner for freedom, that she was a slave, are not admissible in evidence. *Ib.*

19. A judgment obtained against an executor or administrator of a deceased person, is not evidence on a bill filed in chancery against the heirs or devisees of the deceased for a sale of the real estate of the deceased. *Duvall et al. v Green*, 270
Harwood v Rawlings's Heirs, 126

20. On a *scire facias* by W against S, terretenant of D, he pleaded that D was not seized of the land, &c. Evidence was offered that the land was granted to R in 1764, and conveyed by D to S in 1803. That D cleared a part of the land, and built a dwelling-house thereon, and lived therein 24 years. That he declared, when he first took possession, that he had rented the land of S O, and it was proved that D paid rent for the land to S O before it was cleared, for 7 or 8 years—*Held*, that the declarations of D were admissible in evidence; and W was not entitled to recover. *Webster v Saunders, terret. of Duley*, 287

21. An additional account returned to the prerogative court in 1755 by R D, (under whom the defendant claimed the property in question,) who had intermarried with the executrix of W F, certified under seal by the register of wills, was admitted in evidence in action of trover for slaves, brought by the administrator of J F, the daughter and representative of W F, against a person claiming the slaves under R D. *Hepburn Adm'r. of Fishwick v Sewell*, 402

22. Certain facts declared to be inadmissible as evidence, the direct tendency of which was to impeach and nullify the letters of administration granted to the plaintiff, by showing that they were not granted by the orphans court, but by a deputy clerk in the office of the register of wills, to whom the court could not delegate any such authority—*Held*, that the letters of administration were legally efficient until revoked, being clothed with all the requisite legal solemnities to communicate power and authority to the plaintiff to administer

on the estate of the deceased. *Hepburn, Adm'r. of Fishwick v Sewell*, 403

23. In trespass for entering the close of P, and carrying away slaves, &c. the evidence was, that D took the property, alleging that he took it as a distress for a certain sum of money due to him for rent from P, and he stated to P the amount of the rent alleged to be due to him; that he was going to take the slaves as a distress for the said rent—the slaves being on the premises of D, then in the occupation of P, who made no objection to the sum stated to be due for rent, but made no acknowledgment that he did or did not owe any rent, but requested D to take other property instead of the slaves, which was refused—*Held*, that the evidence was not sufficient to prove that any rent was due for which a distress could be made, though it would be sufficient to show that rent was due by the plaintiff. *Benson v Anderson*, 315

24. Where there were facts and circumstances sufficient to be left to the jury for them to decide whether or not the defendant had promised to pay the plaintiff the claim sued for. *Allstan's Adm'r. v Contee's Ex'r.* 351

25. Where the court held that the evidence offered took the case out of the act of limitations. *Ib.*

26. To disprove the plea of *plene administravit*, pleaded by an executor defendant, the plaintiff offered in evidence a lease, duly executed to the testator, for a lot of ground, for 99 years, at an annual rent—*Held*, that it might be read in evidence, although it had not been returned in the inventory to the orphans court, and although no notice had been given to the defendant that it was intended to be offered in evidence, to show a fraud or want of truth in the inventory. *Dukehart's Ex'rs. v The State use of Jacobs*, 506

27. Where a variety of contested facts were laid before the jury, and on the consideration of them they had to decide whether a promissory note had been tainted with usury in its inception or negotiation, it is not for the court to advise them as to the conclusions they are to draw the one way or the other. *Burt v Gwinn*, 507

28. It is sometimes the duty of the court to decide the law upon facts, but it is after they are well ascertained by admissions or otherwise, and not while they are unsettled between the parties. *Ib.*

29. Although the declarations of a merchant's clerk, made to a notary public in the course of business, may be used as evidence for some purposes, they cannot be used to establish a fact immediately connected with the solemnity of protesting. *Ib.*

30. Where a part of the testimony of a witness was, "that the sum of $150 retained by W, *as he the witness understood and presumed*, was about the sum intended to be charged for discount upon the said note"—*Held*, that the expressions, "as he the witness understood and presumed," taken alone and unconnected by others used by him, import his opinion, and were in themselves inadmissible evidence; but as they could not be separated from the other part of the testimony, without doing more mischief than the retaining them would do, they are admissible evidence. *Ib.*

31. The payee of a promissory note is a competent witness in an action on it by the holder against the maker, to prove that the plaintiff was the holder of the note, and had paid him the full value thereof before the note became due, and that the note was not deposited in the bank by him the witness, nor for his use, and the note was endorsed by him to the plaintiff, by his writing his name upon the back of the note, at the time of the delivery thereof by him to the plaintiff. Per *Baltimore County Court*. *Ib.*

32. The answer of one defendant in chancery cannot be read in evidence against a co-defendant. *Hayward v Carroll, et al.* 518

33. If a complainant in chancery is interested in establishing a fact by the evidence of a co-defendant, he may examine him as a witness. *Ib.*

34. Where the contract of the parties is in writing, it can only be proved by its production and proof of its execution, or by the admission of the party who executed it. A copy is not evidence though proved to be a true copy, unless the original is lost, destroyed, or in the possession of the adverse party. *Ib.*

35. A complainant in his bill in chancery must put in issue whatever he intends proving, otherwise it will not be permitted to be given in evidence. *Ib.*

36. A resulting trust may be proved by parol. See TRUST & TRUSTEE, 3, and *Dorsey et al. v Clarke et al.* 551
37. A conventional trust cannot be proved by parol. See TRUST & TRUSTEE, 4, and *Ib.*
38. Certain proceedings had by commissioners under a special authority delegated to them to condemn land, &c.—*Held*, not to be evidence. See SPECIAL AUTHORITY, and *Levy Court of Baltimore County's Lessee v Gwynn*, 227
39. Where the defendant had read in evidence a letter from the plaintiff to A G, referring to a memorandum which A G had sent to the plaintiff, such memorandum may be read in evidence by the plaintiff for the purpose of explaining the letter. *Barney v Smith*, 485
40. In *case* in the nature of *Waste*, brought by a landlord against his tenant, for destruction done to the house rented, the plaintiff offered evidence, that the defendant used the house for the purpose of receiving therein a certain newspaper, and having reason to believe that the house would be attacked by a lawless armed multitude, if the said paper was received in, and distributed therefrom, he lawfully collected a number of armed men for the purpose of defending the house; and that it was after the introduction of the said armed men, and commencement of the distribution of the said paper therefrom, that the said armed multitude attacked, ruined, and spoiled the house—*Held*, by Baltimore county court, that the evidence was admissible to go to the jury. *White v Wagner*, 373

See Assault & Battery.
—— Commission & Commissioners.
—— Common Carrier 2.
—— Conveyance 1.
—— Court of Chancery 14.
—— Covenant 1, 2.
—— Gift 1.
—— Grant 2, 3, 4, 9.
—— Guaranty 2.
—— Inquiry of Damages.
—— Insurance 1.
—— Land Commission.
—— Limitation of Actions 1, 11, 13.
—— Location of Lands 2, 3.
—— Parol Evidence.
—— Presumption 1, 2.
—— Promissory Note 2, 3, 6.
—— Trover 1, 2.
—— Trust & Trustee 4.
—— Warranty 2, 3.
—— Will 1, 2, 3, 4.

EXCUSE.

See Common Carrier 1.

EXECUTION.

1. Where a rule had been laid on a sheriff to return an execution issued from the court of appeals by a particular day, no judgment can be rendered against him in that court under the act of 1794, *ch.* 54, if he fails to make a return by the day, unless there is an affidavit, stating that the execution had been delivered to him, or that he had been served with a copy of the rule. *Cadwallader v Ringgold*, 564

See Capias ad Satisfaciendum.
—— Fieri Facias.
—— Surety 1.

EXECUTORS & ADMINISTRATORS.

1. On the petition of E, as the executrix of her husband, to the orphans court, for an allowance of commission on the amount of the inventories returned, that court decreed that no commission should be allowed—1. Because in all the settlements made by the agent of the executrix all his expenses were charged and allowed, under an express avowal by him that no commission would be charged by her. 2. In consequence of the abandonment of commission, charges against the estate, where vouchers were not in form, or altogether wanting, were allowed. On appeal, *reversed*, and decreed that the executrix be allowed for her commission 5 pr. cent on the amount of the inventories, excluding what may have been lost or may have perished. *Eversfield's Ex'x. v Eversfield's Representatives*, 12
2. By an order of the orphans court made in August 1797, the executrix of C S was ordered to deliver to S W, one of her sureties in the testamentary bond, all such part of the estate of the testator which was remaining in her hands. S W entered into bond to the state, dated in September 1797, reciting the above order, and conditioned that he should deliver and pay all the goods, &c. which should come to his possession by virtue or under the said order, or the value thereof agreeably to law, "to such person or persons as have a right to demand the same, when he shall be thereto legally required," &c. An action of debt was brought on the bond in September 1811, at the instance of one of the creditors of the deceased testator, against one

of the sureties therein, who pleaded general performance, and the acts of limitations of 1729, *ch.* 24, and 1715, *ch.* 23—*Held*, that a creditor was not entitled to have the bond sued, as S W could not pay the debts of the deceased, nor could he recover debts or pay legacies, or settle an account with the orphans court; that he may be likened to one who has letters *ad colligendum;* that he was liable to the administrator *de bonis non*, (the executrix being dead,) if one was appointed; and if none appointed, he was liable to no body. *The State use of Chamberlain's Ex'rs. v Wright*, 143

3. —— *Held* also, that the bond above mentioned was the *thing in action*, and not the judgment, mentioned in the replication, obtained by the creditor against the executrix of C S, in 1803; and that the act of limitations was a bar to the action. *Ib.*

4. Where a sale of lands, made by executors under a will, to T, was for the benefit of one of the executors—*Held*, that the sale was void. *Singstack's Ex'rs. v Harding*, 186

5. One of the executors has no right to retain the whole of the commission allowed by the orphans court to the executors, upon the ground that he had solely transacted the business of the administration. *Richardson's Adm'x. v Stansbury*, 275

6. Will the acknowledgment of the agent of an executrix take a case out of the act of limitations? *Quere. Lansdale's Ex'x. v Ghequiere*, 257

7. To disprove the plea of *plene administravit* pleaded by an executor defendant, the plaintiff offered in evidence a lease duly executed to the testator for a lot of ground for 99 years, at an annual rent—*Held*, that it might be read in evidence, although it had not been returned in the inventory to the orphans court, and although no notice had been given to the defendant that it was intended to be offered in evidence to show a fraud or want of truth in the inventory. *Dukehart's Ex'rs. v The State use of Jacobs*, 506

8. It not being stated in a declaration against an administratrix, that she promised *as administratrix* to pay, her assumpsit to pay the claim cannot disprove her plea of the act of limitations. See DECLARATION 3, and *Chapman v Dixon's Adm'x.* 527

See Application of Payments 2.
—— Court of Chancery 16.
—— Evidence 19, 21.
—— Jurisdiction 3.
—— Legacy & Legatee.
—— Limitation of Actions 9, 12.
—— Pleading.
—— Presumption 2.
—— Small Debts.
—— Testamentary Bond.
—— Trover 3.

EXECUTORY DEVISE.

See Devise 2.
—— Gift 2.

EXEMPLIFICATION.

See Evidence 10.

EXEMPTION.

See Common Carrier 3.

EXPLANATION.

See Evidence 3, 39.

EXTINGUISHMENT.

See Release.

F.

FACTS & LAW.

See Law & Facts.

FEME COVERT.

See Trust & Trustee 6.

FERRY.

See Court of Chancery 3.

FIERI FACIAS.

See Execution.
—— Surety 1.

FORFEITURE.

See Bank & Bank Stock 1.

FOREIGN JUDGMENTS.

See Evidence 12,
—— Judgment 3.

FOREIGN RECORDS.

See Evidence 10.

FORNICATION.

Where, under the act of 1796, *ch.* 34, directing the proceedings against persons guilty of fornication, the record stated the affidavit of the mother of an illegitimate child, the order on the father of the child to pay for the support of the child for four years, &c. proof of demand, refusal, and a *scire facias* (on a recognizance pre-

viously entered into by the father in the sum of $30, conditioned to indemnify the county, &c.) stating that the county had not been indemnified, &c. The defendant pleaded, 1. That the child was at its birth committed to the custody of H B, and so remained. 2. That the mother never had the custody of the child. 3. A submission to arbitration, an award, and an offer of compliance therewith, which was refused. 4. That the sum of $30 a year was more than adequate for the maintenance of the child. 5. That the county had not been damnified. Issues were joined to the 1st and 2d pleas, and general demurrers to the others, which demurrers the county court ruled good. Verdicts on the issues in fact for the plaintiff, and damages assessed to $120, and execution awarded for $30 debt, and costs, which were taxed, part in money and part in *tobacco*, with a memorandum that the judgment was to be released on payment of $120, and costs. On appeal, the judgment was *reversed*. *Grantz & Fralick v The State use of Crist et ux.* 121

FRAUD.

1. A sale of an unsound slave, known to be so by the seller, and concealed from the purchaser, held to be fraudulent, and the purchase money recovered back. *Duvall v Medtart*, 14
2. A carried N to B, and passed him off to B for a friend of his residing in *W*, (a few miles distant,) and thereby induced B to sell to them certain slaves for a less price than they were worth, with an understanding that they were to be kept by A and N in the neighbourhood; whereas the slaves were intended for N, who was a dealer in slaves, and who removed those so purchased of B out of the state, into the state of *South Carolina*. In an action brought by B against A to recover damages for the fraud and deceit—*Held*, that the objection that the agreement was a special verbal promise to answer for the default of another person, and void under the statute of frauds, could not be sustained; but that it was a cheat and fraud on the part of A, for which B was entitled to damages. *Adams v Anderson*, 558

See Agent 4.
—— Bill of Sale 3.
—— Consignee 2.
—— Court of Chancery 8, 13, 15.
—— Evidence 8,
—— Trust & Trustee 2.
—— Warranty 2.

FREEDOM.

1. The reputation of the neighbourhood that the mother of a petitioner for freedom was a free woman, is not admissible in evidence. *Walls v Hemsley et al.* 243
2. The declarations of a person since dead, but then holding the mother of a petitioner for freedom in slavery, that she was a slave, are not admissible in evidence *Ib.*
3. L B by his will dated in 1811, bequeathed freedom to his negro woman A, who was above the age of 45 years; he also bequeathed to her the advantages of her son as a labourer, so long as she lived, and a young bay mare, and four barrels of corn, 300 weight of pork, a cow, hoe and axe, and sundry other articles; and that her son J be the entire right and property of the said A—*Held*, that under the act of 1796, *ch* 67, prohibiting the manumission of any slave above the age of 45 years, &c. A was not entitled to freedom. *Burrough's Adm'r. v Negro Anna*, 262
4. Where a slave had been imported into this state in 1792 by his owner, who had not complied with the provisions of the act of April 1783, *ch* 23, by causing a registry, &c. to be made of the slave—*Held*, that the slave was entitled to freedom. *Henderson v Negro Tom*, 282

FREIGHT.

1. A S in April 1809, being the owner of an *American* vessel, entered into a charter party of affreightment with N T, to receive on board of the vessel a cargo of flour in barrels, and proceed from *Baltimore* to *Madeira*, and there deliver the cargo to J P; and if he should so order, proceed, after having changed her papers and flag, to *Liverpool*, and there deliver the cargo to the agent of N T, if permission be given to discharge the cargo there; and if not, then proceed to *Lisbon* or *Cadiz*. J P was authorised to order the vessel to either *Cadiz* or *Lisbon*, without going to *Liverpool*. The rates of the freight were stipulated, viz. 9 shillings sterling per barrel on the voyage ending at *Madeira;* 11 shillings and 3 pence sterling if the vessel proceeded from *Ma-*

deira to *Cadiz* or *Lisbon*, without landing her cargo; 13s. 6d. sterling, if landed at *Madeira*, and reshipped and carried to *Lisbon* or *Cadiz*, or to *Liverpool*, or if prohibited being discharged at Liverpool, and taken either to *Lisbon* or *Cadiz*, or back to *Madeira*, with 5 per cent. primage, &c. The vessel sailed in April, and arrived at *Madeira* in May, and was ordered by J P to proceed with her cargo to *Liverpool*, without landing any part of her cargo, or changing the flag or papers, where she arrived after the 10th of June, and delivered the cargo to the agent of N T. The proclamation of the president of the *U. S.* of the 19th of April 1809, declared that the orders in council will have been withdrawn on the 10th of June then next, after which day the trade of the *U S* with *G B*, as suspended by an act of congress, may be renewed. On delivery of the flour at *Liverpool*, the agent of N T paid freight at the rate of $2 50 per barrel, which was received by the captain of the vessel without prejudice to the further claim of A S for 50 cents per barrel, so as to make the freight $3 per barrel for the voyage from *Madeira* to *Liverpool;* and for which A S brought an action of *assumpsit* against N T—*Held*, that if the voyage from *Madeira* to *Liverpool* was undertaken in consequence of a new contract between J P, as agent of N T, and the captain of the vessel, then the action might be supported; but that no evidence of such new contract had been proved, for which reason A S could not recover. *Schwartze, et al. v Tyson*, 288

2. In *assumpsit* to recover a sum of money retained by the defendants on an account of freight, out of the proceeds of that part of the cargo which was the property of the plaintiff—*Held*, that the contract between the parties, as collected from the charter party, the bill of lading, and a subsequent agreement, was that the goods shipped by the plaintiff should not be landed on the island of *Sylt*, but at some permitted port on the continent of *Europe*, before any freight should be earned; but in the event of the whole of the ports on the continent being *shut*, then, and not otherwise, the defendants should be entitled to freight on the goods being landed in *England*, with a stipulated addition. That by the term "*shut*" was meant an occlusion by the municipal regulations of the country. That the ship owners had a right to make any other contract they pleased with the plaintiff, varying or annulling the charter party, in relation to his part of the cargo. That whether it would or would not have been expedient to attempt the landing of the cargo on the continent, was not a matter for the jury. That the only question proper for the jury was, whether the whole of the ports on the continent of *Europe* were by municipal regulations closed against the admission of the goods of the plaintiff. If they were, the vessel earned freight by going to *England;* if on the contrary any of them were open to such goods, the defendant had no right, under the stipulations in the agreement, to charge freight on landing them in *England*, and the plaintiff was entitled to recover any sum of money retained by the defendants on that account, notwithstanding the distracted state of *Europe* might have rendered it hazardous to seek such open ports. *Mactier v Wirgman, et al.* 568

G.

GENERAL REPUTATION.

See Evidence 4, 17.

—— Trespass.

GIFT.

1. J J, being the owner of a female slave named *Hannah*, and his daughter and her husband then living in his family, and having an infant daughter named *Anna*, then in the cradle, which *Hannah*, then a girl of seven years of age, was rocking, he called *Hannah* to him, and put his hand on her, said, that he requested the persons then present to take notice, that he then gave *Hannah* to *Anna*, and declared that *Hannah*, and her posterity, should be the property of *Anna*—*Held*, that this parol gift was sufficient in law to transfer the property in *Hannah* to *Anna*. *Negro Hannah & Children v Sparks*, 310

2. M B conveyed to his sister S B, by deed of gift, a negro girl called L, *to her and her lawful issue forever*, and if she died *without issue aforesaid*, the said negro girl, and her increase, to return to the estate of the donor. S B died without ever having had lawful issue—*Held*, that the dying without issue generally is too remote, either in a deed or will; and

that by virtue of the deed of gift, and by operation of law, the whole interest in the said negro vested in S B. *Johnson v Negro Lish*, 441

GRANT.

1. A tract of land called *N B*, described in a grant to run "E and by S 8 ps. to the head of *D's* creek, and running down with said creek the following courses, N, &c." *seven courses*, "to a point at the mouth of a cove, thence N 39° E 26 ps. to the point of another cove, thence with said cove W N W 24 ps. thence N 26° W 34 ps. cross the cove to the beginning of a tract of land called *G*, it also being a bounder of 60 acres of land called *D*, and running with the said 60 acres by a line drawn N and by W 30 ps. still bounding with the said land by a line drawn W 166 ps. then E N E 204 ps. to the head of *N's* cove, then with a straight line to the first tree." *Held*, that there being only one location on the plots of *D's* creek, and the letter *I* on the plots being located by the defendant as the head of *D's* creek, and not counterlocated by the plaintiff, the E and by S 8 ps. course to the head of *D's* creek must terminate at the head of that creek as located on the plots; that from the head of that creek the true location is according to the grant, the following courses: running down and with the creek N, &c. *seven courses*, to a point at the mouth of a cove, the said cove and point to be ascertained by the jury, thence, as expressed in the grant, N 39° E 26 ps. to the point of another cove, also to be ascertained by the jury, thence with the said cove W N W 24 ps. thence N 26° W 34 ps. across the cove to the beginning tree of *G*, and a bounder of *D*. That if the beginning of *G*, and the bounder of *D*, cannot be proved, or if no such tracts can be proved, then the N 26° W 34 ps. course is to run across the said cove to the end of the said line, and then run the several courses mentioned in the grant, without regarding the calls to *G* and *D*. That it is the province of the jury to ascertain, according to the proof, the points and coves called for, there being no particular designation contained in the grant of the coves, or the points of the coves called for. *Williams's Lessee v The Trustees of the Poor, &c.* 210

2. The grant of a tract of land called *M*, dated in 1776, described it as "beginning at the end of the N 200 perches line of a tract of land called *C*, (granted in 1695,) it being the second line of said land, and running thence N E and by N 44 perches," &c.—*Held*, that the beginning of *M* depends on the true location of *C*, which beginning must be at the place or point where the N 200 perches line of *C* terminates; and that the termination of the said line was to be ascertained by the jury, according to the evidence, and on such allowance for the variation of the compass as the jury might find to be right and proper. *Green v M'Clellan*, 202

3. —— That in locating *M*, the jury were bound to begin at the place where they found the N 200 perches line of *C* terminated, and could not begin *M* at the place where they might be of opinion, from the evidence, the taker up of that tract actually terminated the N 200 perches line of *C*, for the purpose of fixing the beginning of his own tract. *Ib.*

4. A tract of land called *S F*, was surveyed in 1694, and granted in 1695. Another tract called *G C*, was surveyed in 1796, and granted in 1798. This last tract is described in the certificate and grant as beginning at a stone heretofore planted in the place or spot where formerly stood a bounded red oak, the last bounded tree of a tract of land called *S F*, and running from thence reverse the third line of *S F*, and bounding thereon, *as now laid down with an allowance of forty-five minutes for variation*, &c.—*Held*, that the first line of the tract of land called *G C*, must be run from the stone described as the place of beginning, according to the survey made of *S F* in 1796, (the time when *G C* was taken up,) with an allowance of forty-five minutes for variation, as expressed in the certificate and grant, and not according to the true location of *S F*, as *S F* was originally surveyed in 1694. *Pumphrey's Lessee v Ashpaw*, 368

5. A tract of land called *Painter's Rest* was surveyed in 1678, "beginning at a marked chesnut tree standing on a bank by a valley near the river side, being an easterly bounded tree of a parcel of land laid out for S H, and from thence bounded with the river on the S, by a line drawn E S E 75 ps. to a marked red oak standing on

a bank by the river, being the first bounded tree of the former survey, and from the said oak, bounded with the river, and the main branch of the river, by a line drawn E southerly 475 ps. to a marked red oak standing by the side of a branch, respecting a fork of the branch on the opposite side, and running from the said red oak, by a line drawn N E 535 ps. and from the end of the N E line, by a line drawn W N W 435 ps. and from the end of the W N W line, with a straight line 730 ps. to the first bounded chesnut." A tract of land called *Heath's Range* (a) was surveyed in 1704, "beginning at a marked black oak standing at the end of the N E line of *Painter's Rest*, and running thence *with Painter's line, W N W 435 ps. thence along and with Painter's last line S 36° W 210 ps.* to the heads of the lands surveyed from the river side, then N W along and with the heads of the said lands," &c. On the question whether the expressions in the grant of *Heath's Range*, which calls for the W N W and the home lines of *Painter's Rest*, imperatively bind *Heath's Range* with *Painter's Rest* on those two lines? The county court were of opinion, that the expressions in the grant of *Heath's Range* were imperative, controling both courses and distances, and that the lines of *Heath's Range* must be either enlarged or shortened, so as to correspond with the true location of *Painter's Rest*; but that the jury were to decide on the facts, and that they were the sole judges what was the true location of *Painter's Rest*, and to determine in what manner *Heath's Range* was surveyed, whether agreeably to what the defendant contends to be the true location of *Painter's Rest*, or whether as corresponding to the grant of that tract as located by the plaintiff.—On appeal, *reversed*. See ERRATA, 451——45· *Pennington v Bordley, et al. Lessee*, 450

6. —— The end of the N E line of *Painter's Rest* is the beginning of *Heath's Range*. The grant of the last tract containing a double description of the place of beginning, and that ought to be adopted, which from the expressions of the grant is most certain, and most conformable to the intention of the parties to be collected from the grant. If it could be done consistently with the proof, the location ought to be made so as to comply with both descriptions. Per *Chase*, Ch. J. *Ib.*

7. —— *Heath's Range* must begin at the end of the N E line of *Painter's Rest*, wherever the jury may find the same to be, and bind with *Painter's Rest* as expressed in the grant, unless the boundary called for as the beginning of *Heath's Range* is proved, in that case *Heath's Range* must begin at the said boundary; and if such boundary does not stand in the W N W line, then a course must be shaped in the nearest direction to strike the said W N W line, and then the first and second lines of *Heath's Range* must bind on *Painter's Rest*, as expressed in the grant. Per *Dorsey*, J. *Ib.*

8. The exposition of deeds or grants is solely confided to the court, and their construction must be made on the expressions of the grant, and not on facts *aliunde*. *Ib.*

9. In ejectments in which the controversy is about the location of the land, it must be located according to the different views or pretensions of the litigant parties. To support these locations the evidence is introduced, on which the question of law arises, as to the true location of the land, which must conform to the true exposition of the grant. The plot exhibits to the view of the court the position of the land, the courses and distances and calls, that the court may decide on the true construction of the grant, and the legality of the evidence offered, as applicable to it, and the legal sufficiency of it. The plot can in no wise limit, control or change, the legal and constitutional power of the court in deciding on the construction of the grant. *Ib.*

10. A latent ambiguity is that kind of ambiguity which is concealed or not apparent on the face of the grant, but is created by the admission of parol evidence, showing that there are two tracts of land to which the description in the grant is applicable, which renders it uncertain which was intended to pass by the grant; and that uncertainty is removed by the same kind of evidence. And so where there are two trees set up to gratify the call, or two places set up as the head of the creek called for. In all these cases the jury ascertains, and fixes the call according to the

(a) See Errata.

LAW & FACTS.
See Evidence 24, 27, 28, 36.
—— Freight 2.
—— Grant 8, 9, 10, 11.
—— Guaranty 2.
—— Jury.
—— Location of Lands 3.

LEASE.
See Executors & Administrators 7.
—— Tenant for Life & Years 1, 2.
—— Use & Occupation.

LEASEHOLD ESTATE.
See Devise 2.

LEGACY & LEGATEE.
1. A legacy left to the real distressed poor of *Talbot* county was held to be void for uncertainty and impracticability of correctly ascertaining the objects of the bequest. *Trippe v Frazier, et al.* 446
2. A devise that the proceeds arising from a sale of lands, &c. should be *equally divided* between the testator's brother J S, and the testator's brother G S's children—*Held*, that J S took as a tenant in common, an equal part, and no more, with each of the children of G S. *Maddox v The State use Swann, et al.* 539
3. A joint action may be maintained on a testamentary bond at the instance of persons claiming under different rights as legatees. *Ib.*
4. —— Not bound to prove that all the legatees were alive at the time of the trial. *Ib.*

See Court of Chancery 18.
—— Interest 3.
—— Testamentary Bond.

LENGTH OF TIME.
See Presumption 2.

LESSOR & LESSEE.
See Rent 2.
—— Waste 1, 2.

LETTERS.
See Evidence 3, 39.

LETTERS OF ADMINISTRATION.
1. Certain facts declared to be inadmissible as evidence, the direct tendency of which was to impeach and nullify the letters of administration granted to the plaintiff, by showing that they were not granted by the orphans court, but by a deputy clerk in the office of the register of wills, to whom the court could not delegate any such authority—*Held*, that the letters were legally efficient until revoked, being clothed with all the requisite legal solemnities to communicate power and authority to the plaintiff to administer on the estate of the deceased. *Hepburn, Adm'r. of Fishwick v Sewell.* 403

LETTERS TESTAMENTARY.
See Letters of Administration.

LEX LOCI.
See Assumpsit 1.

LICENSE.
See British License.

LIEN.
See Bill of Exchange 1.
—— Consignee & Consignor, 1, 2.
—— Court of Chancery 6, 12, 24, 25.
—— Evidence 9.

LIMITATION OF APPEALS, &c.
See Writ of Error.

LIMITATION OF ACTIONS.
1. B H in 1805 filed a bill in chancery against the heirs of R R, on a bond executed by R R in 1789, the personal estate being insufficient. The heirs by their answer relied on the act of limitations; and to prevent the operation of the act, B H exhibited a judgment obtained by him in 1802 on the administration bond executed by the administratrix of R R—*Decreed*, that the bill be dismissed. *Harwood v Rawlings's Heirs,* 126
2. In an action on a bond executed in 1797 to the state, by one of the sureties in a testamentary bond, on the property of the deceased, unadministered by the executrix, being delivered to such surety, brought, in 1811, at the instance of a creditor of the deceased, the defendant pleaded the act of limitations—*Held*, that the bond executed in 1797 was *the thing in action*, and not the judgment mentioned in the replication, obtained by the creditor against the executrix, in 1803; and that the act of limitations was a bar to the action. *The State, use of Chamberlaine's Ex'rs. v Wright,* 148
3. S D, a tenant in tail of a tract of land, in May 1777, sold it to J D, and put him in possession, giving him a bond of conveyance. In September 1777 S D died, not having conveyed the land to J D. At the death of S

D, his son E H D, the heir in tail, was seven years of age, and on the 8th of July 1805 he brought an action of ejectment to recover the land. J D, and those claiming under him, had always, since May 1777, been in possession. *Quere.* Whether E H D, the issue in tail, was not barred by the statute of limitations from recovering, as he did not enter or bring his ejectment, either within 20 years after cause of action accrued, or 10 years after he arrived at the age of 21 years? *Dorsey v Dorsey's Lessee,* 215

4. Will the acknowledgment of the agent of an executrix take a case out of the act of limitations? *Quere. Lansdale's Adm'x. v Ghequiere,* 257

5. Will the following expressions in a will revive a debt due from the testator, which was barred by the act of limitations, viz. "When all my just debts and funeral expenses are paid, I devise," &c? *Quere.* *Ib.*

6. No right of action vested in any person to sustain an action of trover for certain slaves of J F, deceased, before letters of administration were granted; and the act of limitations could not begin to operate before such letters were taken out, nor attach until demand and refusal. *Hepburn, Adm'r. of Fishwick v Sewell,* 393, 430

7. A trustee cannot avail himself of the act of limitations against his *cestui que trust.* *Ib.*

8. Where the court held that the evidence offered took the case out of the act of limitations. *Allstan's Adm'r. v Contee's Ex'r.* 351

9. In an action of *assumpsit* against an administratrix, she pleaded the act of limitations; and to avoid the bar the plaintiff proved, that immediately preceding the institution of the suit, he presented his account to the defendant, who said she did not wish to see it; that she would pay all just claims against the estate of the deceased, as soon as she obtained money, and that she would put the money into the hands of the orphans court, to have the same adjusted; and that if the plaintiff would pass his account with the orphans court, she would pay it—*Held,* that these declarations of the administratrix were sufficient to prevent the operation of the act of limitations. By announcing her determination to pay all just claims, she waived all benefit of the statute, and her subsequent promise to pay the account, if the orphans court would pass it, demonstrated her willingness to pay the claim if it was found to be correct. Per *Martin* and *Dorsey,* J. *Chapman v Dixon's Adm'x.* 527

10. Whether or not an agreement between the plaintiff and defendant, to refer the matter in dispute to arbitration, will operate to take the case out of the act of limitations? *Quere.* *Ib.*

11. In *assumpsit* by S S, as surviving partner of S and J S, the declaration stated the promise to be to S and J S in the lifetime of J S. The act of limitations was pleaded; and to take the case out of the statute, evidence was offered of a promise made to S S after the death of J S—*Held,* that the evidence was sufficient to avoid the statute; and that there was no necessity to declare specially on the promise to the plaintiff as surviving partner. That the act of limitations does not operate to extinguish the debt, but to bar the remedy. That it is predicated on the principle that from length of time a presumption is created that the debt has been paid, and that the debtor is deprived of his proof by the death of his witnesses, or the loss of receipts. But the acknowledgment or admission of the debtor will take the case out of the act. *Barney v Smith,* 486

12. —— The case of a surviving partner is distinguishable from that of an executor or administrator. The right and remedy are united in him; the original promise made to him and his deceased co-partner, still exists, and the right of action, with the remedy, survived to him. The acknowledgment to the surviving partner saves and preserves the remedy in the survivor, and avoids the bar by the act of limitations. It does not create a new *assumpsit,* but is a saving of the remedy on the original promise. *Ib.*

13. An acknowledgment of the debt—an offer to come to a settlement, or to refer to arbitrators, will take a claim out of the act of limitations. Per *Johnson,* J. *Ib.*

14. It not being stated in the declaration against an administratrix, that she promised *as administratrix* to pay, her *assumpsit* to pay the claim cannot disprove her plea of the act of limitations. See DECLARATION 3, and *Chapman v Dixon's Adm'x.* 627

15. In order to take advantage of the act of limitations on a bond, as in all other cases, it must be pleaded. *Maddox v The State use Swann, et al.* 539

See Application of Payments 1.
—— Pleading.
—— Writ of Error.

LOAN.

See Usury.

LOCATION OF LANDS.

1. A grant was located on the plots by the plaintiff in ejectment, as issued to C, D and M, on the 2d of September 1732, and at the trial he offered to read in evidence a grant for the same land to C, M and E, on the 8th of August 1735—*Held*, that it might be read in evidence. *Shields's Lessee v Miller*, 1
2. The plaintiff in ejectment proved by a witness the time when M S was born. The defendant then proceeded to examine the same witness in order to establish his location made on the plots of a tract of land called *C*, for which he took defence. The plaintiff then offered to ask the witness if he did not own or claim title to the tract of land called *P*, located by the defendant, in order to show that the witness was interested in having the location of *C* established —*Held*, that the plaintiff was at liberty to ask the question of the witness for the purpose of showing that he was interested, and incompetent to give evidence relative to the location of *C*. *Ib.* 5
3. The true location of a tract of land is a question of fact to be decided by the jury on the evidence, and it is their duty to find the location in such place where, from the evidence, they shall be of opinion the lines thereof were originally run unless they shall find from the evidence that the party insisting on the original location, is prevented by some agreement, by adverse possession, or by some other legal bar, from availing himself of the original location. *Ib.* 6, 7.

See Commission & Commissioners 1.
—— Grant 1, 2, 3, 4, 5, 6, 7, 9.
—— Plots 2.

LOSS OF ORIGINAL, &c.

See Evidence 5.
—— Protest 1.

LUNATIC.

See Court of Chancery 28.

M.

MANUMISSION.

1. Where a deed of manumission has not been enrolled within the time prescribed by law, the chancellor has no authority to decree that it should be recorded. *Wicks, et al. v Chew, et al.* 543
2. L B by his will in 1811, bequeathed freedom to his negro woman A, who was above the age of 45 years; he also bequeathed to her certain personal property—*Held*, that under the act of 1796, *ch.* 67, A was not entitled to freedom. *Burroughs' Admr. v Negro Anna*, 262

MARKING & BOUNDING LANDS.

See Commission & Commissioners 1.

MISNOMER.

See Corporation 1.
—— Evidence 4.

MISREPRESENTATION.

See Fraud 2.

MISTAKE.

See Bill of Exchange 1.
—— Evidence 4.
—— Location of Lands 1.

MONEY.

See Land.

MONEY LENT.

See Promissory Note 6.

MORTGAGE.

1. Where a bill was filed in chancery for the sale of mortgaged premises, where the mortgage had not been recorded—See COURT OF CHANCERY 13, and
Woods, et al. v Fulton & Starek, 329

N.

NAME.

See Evidence 4.

NEGLIGENCE.

See Common Carrier 1.

NEGROES & SLAVES.

See Freedom.
—— Gift 1.
—— Manumission.

NEW TRIAL.

See Court of Appeals.

NON EST FACTUM.

1. On a plea of *non est factum*, the subscribing witness to the bond proved his own attestation, but he had no recollection of having seen the defendant sign, seal, and deliver the bond; that from seeing his handwriting, and from his having lived with the plaintiff as a clerk at the time of the execution of the bond, and from being in the habit of attesting such instruments for the plaintiff, he believed the defendant had signed, sealed, and delivered the bond—*Held*, that the testimony was competent and sufficient to prove the due execution of the bond. *Miller v Honey*, 241

NON INTERCOURSE.

See Assumpsit 1.
—— Freight 1.

NOTARY PUBLIC.

See Evidence 29.

NOTICE.

See Assumpsit 4, 5.
—— Court of Chancery 24, 25.
—— Evidence 26.
—— Executors & Administrators 7.
—— Principal & Agent.
—— Promissory Note 5, 6, 7.
—— Rent 1.
—— Trover 1.

O.

OATH.

See Land Commission.

OCCLUSION.

See Freight 2.

OFFICE COPY.

See Copy.
—— Evidence 21.

OFFICIAL ACTS.

See Evidence 22.

OPEN ACCOUNT.

See Application of Payments 1.
—— Assignment 1.

OPINION.

See Evidence 30.

ORPHANS COURT.

See Executors & Administrators 1, 2.
—— Jurisdiction 2.
—— Letters of Administration.
—— Will 1.

P.

PAROL AGREEMENT.

See Court of Chancery 30.
—— Trust & Trustee 5.

PAROL CONTRACT.

See Rent 2.

PAROL EVIDENCE.

1. Parol evidence is not to be admitted, nor extraneous circumstances introduced, in the exposition of deeds, except in the single instance of a latent ambiguity. *Howard v Rogers*, 278
2. A resulting trust may be proved by parol. See TRUST & TRUSTEE 3, and *Dorsey et al. v Clarke, et al.* 551
3. A conventional trust cannot be proved by parol. See TRUST & TRUSTEE 4, and *Ib.*

See Covenant 2.
—— Evidence 4, 5, 7, 8, 10, 22.
—— Grant 3, 4, 8, 10.
—— Guaranty 3.
—— Letters of Administration.
—— Special Authority 1.
—— Will 2, 4.

PAROL GIFT.

See Gift 1.

PARS RATIONABILI.

See Widow.

PARTIAL LOSS.

See Insurance 3.

PARTIES.

See Appeal 1.
—— Court of Chancery 9, 14, 16, 29.

PARTIES & PRIVIES.

See Assumpsit 1.
—— Evidence 13, 14, 15.
—— Judgment 3.
—— Promissory Note 6.

PARTITION.

See Land Commission.

PARTNERS & PARTNERSHIP.

1. In *assumpsit* by S, as surviving partner of J, the declaration stated the promise to be to S and J, in the life-time of J. The act of limitations was pleaded, and to take the case out of the statute, evidence was offered of a promise made to S, after the death of J—*Held*, that the case of a surviving partner was distinguishable from that of an executor or adminis-

trator; that the right and remedy were united in him—the original promise made to him, and his deceased partner, existing, and the right of action and remedy survived to him; that the acknowledgment to the surviving partner saved and preserved the remedy in the survivor, and avoided the bar by the act of limitations; that it did not create a new *assumpsit*, but was a saving of the remedy on the original promise. *Barney v Smith*, 485

See Court of Chancery 17.
—— Evidence 13, 14, 15.
—— Limitation of Actions 12.

PATENT.

See Grant.

PAYEE.

See Promissory Note 2, 4.

PAYMENT.

See Application of Payments.
—— Surety 1.

PERMISSIVE WASTE.

See Waste 2, 3.

PLEADING.

1. In an action on an administration bond, brought at the instance of M and W, to the plea of general performance, it was replied, that the intestate, in his life-time, was indebted to M and W in a certain sum of money for goods sold, &c. which he promised to pay, and that neither he, nor the administrator, although assets had come to his hands sufficient to pay all the debts of the intestate, had paid, &c. The defendant's rejoinder was that the intestate did not assume, &c. on which issue was joined. He also rejoined the act of limitations, and tendered an issue, but the plaintiff demurred generally to that rejoinder—*Held*, that if the statute of *Anne* does not permit a defendant to rejoin a double defence to the breach assigned in an action on a bond with a collateral condition, (and whether it does or not? *Quere*) his doing so would only be duplicity in pleading, which can only be taken advantage of by special demurrer. *The State use Millard & Waring v Green*, 542
2. So if a rejoinder, &c. tenders an issue instead of a verification, the objection to it must be assigned as a special cause of demurrer, *Ib.*
3. In order to take advantage of the act of limitations on a bond, as in all other cases, it must be pleaded. *Maddox v The State use Swann, et al.* 539

See Declaration.
—— Evidence 4.
—— Executors & Administrators 9.
—— Fornication.
—— Promissory Note 5, 6.
—— Testamentary Bond.
—— Warranty 3.

PLENE ADMINISTRAVIT.

See Executors & Administrators 7.

POLICY OF THE LAW.

See Wager.

PLOTS.

1. Under what circumstances a copy of a private plot of the land in dispute may be read in evidence. *Carroll, et ux. v Smith*, 128
2. If the sales of certain lots of land were made at public auction, or at private sale, by a plot, the purchasers have a right to hold the lots according to the location which was made on the plot; and evidence cannot be given that the surveyor, when running the lots preparatory to the making the plot, run the division or other lines different from the lines located on the plot. *Ib.* 131

See Grant 9.
—— Location of Lands 1.

POOR.

See Legacy & Legatee.

POSSESSION.

See Bill of Sale 1, 2, 3.
—— Limitation of Actions 3.
—— Trespass.

POWER.

See Ejectment 5.
—— Trust & Trustee 6.

PRACTICE.

See Execution 1.

PREFERENCE.

See Court of Chancery 6.
—— Insolvent Debtor 1, 2.
—— Surety 2.

PRESUMPTION.

1. How far certain facts and circumstances were sufficient to lay a foundation to have justified the court in directing the jury to presume a grant of the land in question? *Quere. Clerklee v Mundell's Lessee*, 437

2. Where the evidence and length of time did not warrant the presumption that R D, with the assent of the persons entitled to distribution of the estate of J F, took upon himself the executorship, and fully administered all the assets of J F by paying debts, &c, to the value of the assets. *Fishwick's Adm'r. v Sewell*, 402, 403.
See Trover 2.

PRIMA FACIE EVIDENCE.
See Judgment 3.

PRINCIPAL.
See Interest 1, 2.

PRINCIPAL & AGENT.
1. In a case between a principal and his agent, in which the latter seeks to shelter himself behind his own illegal act in an illegal transaction, the reason as to constructive knowledge does not hold, and the law will not, on the principle of constructive notice, work injustice, by subjecting the principal to the consequences of an illicit transaction, whether he had any participation in it or not, to enable the agent, the actual violator of the law, and entitled to no favour, to take advantage of his own wrong, and cheat his employer. *Chappell & Stansbury v Wysham*, 560
See Trust & Trustee 5.

PRINCIPAL & SURETY.
See Release.
—— Surety.

PRIVATE FERRY.
See Court of Chancery 3.

PRIVATE PLOT.
See Plots 1, 2.

PROBATE.
See Will 1.

PROCEDENDO.
See Court of Appeals 1.

PROCEEDS.
See Land.

PROHIBITED TRADE.
See Insurance 2.

PROMISSORY NOTE.
1. Where a promissory note was drawn by B, payable to H; and by him endorsed to C, who endorsed to E—*Held*, in an action on it by E against H, that the handwriting of C should be proved. *Hunt v Edwards*, 283
2. Where there was usury in the creation of a promissory note, can a *bona fide* holder maintain an action on it against the payee? *Quere.* *Ib.*
3. The drawer of a promissory note is a competent witness in an action on it by the holder against the payee, to prove that the note was given on a usurious consideration. *Ib.*
4. The payee of a promissory note is a competent witness in an action on it by the holder against the drawer. See EVIDENCE 31, and *Burt v Gwinn*, 507
5. In *assumpsit* on a promissory note dated the 14th of March 1810, and payable 21 months after date, a count in the declaration on the note stated the demand of payment to have been made "afterwards, and after the end and expiration of the said 21 months, that is to say, on the 14th of December 1811"—*Held*, that this count was erroneous, and no recovery could be had on it. *Beck v Thompson & Maris*, 531
6. It is not necessary to declare on a promissory note, but it may be given in evidence on a count for money lent and advanced, where there is a privity between the plaintiff and defendant, as that of payee and drawer, and endorsee and his immediate endorsor. *Ib.*
7. If an endorsor, with the knowledge that the holder of a promissory note has not used due diligence in demanding payment of the maker, promise to pay the amount of the note, such promise is a waiver of the holder's neglect to give notice. *Ib.*
See Evidence 29.
—— Set Off.
—— Usury 4, 5.

PROTEST.
1. No evidence can be given of the protest of a foreign bill of exchange for nonacceptance, without producing the protest itself, or a copy thereof from the books of the notary, or proving that the said books and the original protest are lost. *Chase v Taylor*, 60, 61
See Bill of Exchange 1, 2.
—— Evidence 29.

PUBLICATION.
See Common Carrier 3.

PURCHASE.
1. An estate by *purchase*, at common law, and within the meaning of the act of 1786, *ch.* 45, is an estate acquired by sale or gift, or by any other

method, except only that of descent. *Hall v Jacobs et al. Lessee*, 245
See Descents 3.

PURCHASE & PURCHASER.
1. A sale of an unsound slave, known to be so by the seller, and concealed from the purchaser, held to be fraudulent, and the purchase money recovered back. *Duvall v Medtart*, 14
See Court of Chancery 24, 25.
——Trust & Trustee 3, 4, 5.

PURCHASE MONEY.
See Court of Chancery 24, 25.
—— Trust & Trustee 3, 5.

Q.

QUESTION OF FACT.
See Application of Payments 2.
—— Court.
—— Law & Fact.

QUI TAM ACTION.
1. Whether the judgment to be entered on a verdict in a *qui tam* action is embraced by the act of 1809, *ch.* 153, s. 4, for the amendment of judicial proceedings? *Quere. Boehme v Jisquith, qui tam.* 207
See Usury 1, 2.

R.

REAL ESTATE.
1. Where the proceeds arising from lands devised to be sold, were held to result as real estate. See COURT OF CHANCERY 18, and *Trippe v Frazier et al*, 446

RECEIPT.
See Judgment 1.

RECOGNIZANCE.
See Fornication.

RECORD.
See Evidence 10.
—— Fornication.

RECORD EVIDENCE.
See Evidence 4.

RECOUPE.
See Trover 5.

REFERENCE.
See Limitation of Actions 10, 13.

REGISTER OF WILLS.
See Evidence 22.
—— Letters of Administration,

REGISTRY.
See Freedom 4.

REIMBURSEMENT.
See Surety 2.

REJOINDER.
See Pleading.

RELEASE.
1. J E D made a promissory note, payable to W D, or order, who endorsed it to W M, or order, who endorsed it to E P, or order. J E D and W D entered into a deed of composition with their creditors, (among whom was E P,) by which J E D and W D, having conveyed all their estate to certain trustees, among whom was W M, were discharged from all debts and sums of money due or owing to the said creditors, with a proviso, "that the said release shall not operate in favour of, or be construed to release any person or persons who may be bound for the said J E D and W D, or either of them, or who may have endorsed any notes or note drawn or endorsed by the said J E D and W D, or either of them." Due and legal notice having been given of the nonpayment of the above note, E P brought an action thereon against W M, as one of the endorsers—*Held*, that the action could be sustained, and that the release did not discharge the defendant from his responsibility as endorser. *Pannell v M'Mechen*, 474

RELINQUISHMENT.
See Use & Occupation.

REMOVAL OF CAUSES.
1. Allegations by a creditor against a petitioner for the benefit of the insolvent laws, cannot be removed, under a suggestion, to an adjoining county for trial. *Michael v Schroeder, et al.* 227

RENT.
1. A demand of rent in arrear, before a distress is made, is not necessary. *Offutt v Trail*, 20
2. In an action of *assumpsit* upon an express contract to pay rent for a house, the defence set up was, that a "large multitude of armed men, with high and irresistible force, seized upon and destroyed the demised premises, and evicted the lessee"—*Held*, that as the destruction of the demised premises by fire will not excuse the tenant from payment of the rent on

an express covenant, a principle decisive of this case, so here, although it is a verbal, and not a written contract, on which the claim is founded, yet it is such a lease as the law recognizes; and the promise to pay the rent reserved is just as valid and binding as if it was a covenant under seal; and that the plaintiff was entitled to recover upon the first count in his declaration which charges an express contract to pay rent. *Wagner v White*, 564

3. Whether such eviction would not be a good bar to an action for use and occupation only? *Quere*. *Ib.*

See Covenant 1.
—— Evidence 23.
—— Tenant for Life & Years 4.
—— Use & Occupation.

RENTS & PROFITS.
See Court of Chancery 3.

REPLEVIN.
See Consignee 1.
—— Rent 1.

REPLICATION.
See Pleading.

REPUTATION.
See General Reputation.

RESCINDING OF CONTRACT.
See Evidence 36.

RESULTING TRUST.
See Trust & Trustee 3.

REVERSAL.
1. Where the judgment of the county court is reversed by the court of appeals, and the proceedings are remitted with a writ of *procedendo* to the county court, and on a new trial that court give judgment on the same question, in accordance with the judgment of the court of appeals—such judgment, on appeal, must be affirmed. *Hambleton v Tenant*, 440
Clerklee v Mundell's Lessee, 497

REVERSIONER & REMAINDERMAN
See Tenant for Life & Years 2, 3.

REVOCATION.
See Will 1, 2, 3.

RIGHT & REMEDY.
See Limitation of Actions 11, 12.

RIGHT OF ACTION.
See Limitation of Actions 6.
—— Trover 3.

RULE.
See Execution 1.

S.

SALE.
1. A sale of an unsound slave, known to be so by the seller, and concealed from the purchaser, held to be fraudulent, and the purchase money recovered back. *Duvall v Medtart*, 14

See Bill of Sale 1, 3.
—— Evidence 7.
—— Executors & Administrators 4.
—— Land.
—— Plot 2.
—— Statute of Frauds.

SATISFACTION.
See Judgment 1.

SCIRE FACIAS.
See Evidence 20.
—— Fornication.

SET OFF.
1. A promissory note drawn by P in favour of D may be set off in an action on an open policy of insurance brought by P against D. *Baltimore Insurance Company v M'Fadon*, 36

See Court of Chancery 5.
—— Evidence 13, 14, 15.
—— Trover 5.

SETTLEMENT.
See Bill of Exchange 1.
—— Limitation of Actions 13.

SHERIFF.
1. Where a rule had been laid on a sheriff to return a writ of execution issued from the court of appeals, by a particular day, no judgment can be rendered against him in that court under the act of 1794, *ch.* 54, if he fails to make return by the day, unless there is an affidavit stating that the execution had been delivered to him, or that a copy of the rule had been served on him. *Cadwallader v Ringgold*, 564

SHORT NOTE.
See Declaration 1.

SLANDER.
1. In an action of slander the words charged in the several counts in the declaration were, 1. J A (the plaintiff) did cut my horses' throats. 2. J A did cut my horses' throats, or why did he not come forward and clear himself, or sue me for his character. 3. I am certain that J A cut my horses'

throats and no body else. 4. I believe J A cut my horses' throats, and no body else—*Held*, (after a general verdict for the plaintiff) that the words were actionable. *Yearly v Ashley*, 314

SLAVES.

See Negroes & Slaves.

SMALL DEBTS.

See Jurisdiction 8.

SPECIAL AUTHORITY.

1. Commissioners were appointed under the act of 1768, *ch.* 14, to lay out not more than one acre and an half of ground in *Baltimore Town*, and to agree with the owner thereof for the purchase, or if the owner would not or could not legally contract with them, they were authorised to issue their warrant to the sheriff for summoning a jury, not less than 12 freeholders, to appear before them at &c. on &c. to inquire to whom the land belonged, the value thereof, and what damages the owner would sustain by being deprived thereof. The sum assessed to be paid by the commissioners, and the payment for the land, to invest the justices of *Baltimore* county, and their successors, with an estate in fee simple for the use of the county. The commissioners were to cause the land to be laid out, with boundaries, by the surveyor, and a certificate thereof to be entered on the county records. They were then to contract for building on the said land a court house and prison, &c. The commissioners returned an inquisition taken before them, also a plot and explanation thereof; by which it appeared that one acre and an half and 67 square perches were laid out. It did not appear that any attempt was made to agree with the owner of the land; nor that any warrant issued to summon a jury. The inquisition did not show that the jurors were freeholders. The jury did not find who was the owner of the whole of the land, and what damages would be sustained, they found the owner and value as to part only. There were no boundaries fixed to the land surveyed, and it did not appear that the land condemned was the land surveyed. The survey was not made by the surveyor, but by a deputy. The proceedings were lodged in the office of the clerk of the county court, but not recorded. Evidence was given as to the signatures of the jurors, and that they were all freeholders. One of the commissioners (the others being dead) proved that they met under the act in order to execute it, and did, as he believed, proceed regularly in the execution thereof, but he had no particular recollection of the acts done by them further than his knowledge of his and their signatures, and of the signatures of some of the jurors. A court house and prison were erected on part of the ground, but not on that in dispute. The inquisition and plot, &c. were recorded in 1796 for safe keeping by the clerk, it having remained in his office unrecorded until then. In an action of ejectment brought by the levy court to recover a part of the ground so condemned—*Held*, that the said proceedings were not evidence to prove that the premises mentioned in the declaration, and described in such proceedings, were vested in the justices of *Baltimore* county for the time being, and their successors, in fee simple, for the use of the county, pursuant to the said act of assembly. *Levy Court of Baltimore County's Lessee v Gwynn*, 227

See Attachment 3.

—— Evidence 22.

—— Letters of Administration.

SPECIAL DEMURRER.

See Pleading.

SPECULATING CONTRACT.

See Assumpsit 6.

—— Wager.

STATUTE OF FRAUDS.

1. There is no difference between a sale of real and personal estate at auction, in relation to the statute of frauds. In either case, if the auctioneer inserts in his sale book the purchaser's name, the requisitions of the statute are complied with—the auctioneer being considered for this purpose the agent of both parties. *Singstack's Ex'rs. v Harding*, 186

See Fraud 2.

—— Guaranty 1, 3.

—— Trust & Trustee 3, 4, 5.

STOCK & STOCKJOBBING.

See Assumpsit 6,

—— Wager.

STOPPAGE IN TRANSITU.

See Consignee 2.

—— Evidence 9.

SUBSCRIBING WITNESS.
See Evidence 16.
—— Hand Writing.
—— Promissory Note 1.

SUBSTITUTION.
See Court of Chancery 23.
—— Surety 2.

SUFFICIENCY OF EVIDENCE.
See Evidence 25.

SUPERCARGO.
See Consignee & Consignor 1, 2.

SURETY.
1. J D obtained two judgments, one against J S, and the other against S W, his surety, upon which judgments writs of *fieri facias* issued. The one against J S was laid upon his lands in April 1802, and the one against S W was entered satisfied at May term 1802. A writ of *venditioni exponas* issued for a sale of the lands taken under the *fieri facias* against J S, and was endorsed for the use of S W, and the lands were sold—*Held*, that the payment made by the surety on the judgment against him, and the subsequent entry of satisfaction of such judgment, did not affect the responsibility of the principal debtor; and that such a payment being made subsequent to the levying the *fieri facias* against the principal, was to be considered as only operating at law and in equity, as an assignment of the judgment against him, and therefore that it was strictly correct to carry on the execution for the use of the surety to its full completion. *Sotheron's Lessee v Reed*, 307
2. A surety paying the debt of his principal shall be considered to stand in the place of the creditor for any purpose to answer the ends of justice; and he is entitled to an assignment of the bond of his principal, that he may pursue his remedy against the principal. And if the equitable estate in the land purchased by the principal, and for which the surety became answerable for the purchase money, was about to be sold for the payment of debts, the surety would so far represent the trustee, who sold the land, as to have a decided preference over all the other creditors of the principal. He would also represent the trustee so as to obtain a reimbursement of a person purchasing from his principal for the money the surety has paid the trustee. *Ghiselin & Worthington v Fergusson*, 523
See Court of Chancery 23, 26.
—— Executors & Administrators 2.
—— Release.

SURVIVING PARTNER.
See Partner & Partnership.

SUSPENSION OF CONTRACT.
See Common Carrier 1.

SURVEY.
See Grant 2, 3, 4, 5.

T.

TENANT FOR LIFE & YEARS.
1. If a tenant for life makes a lease for years, and dies before the expiration of the term, the under-tenant, or tenant for years, if he has sown the lands, is entitled to the crop, and he has the right of ingress, egress and regress, to preserve, gather and carry it off. *Bevans et ux. v Briscoe*, 139
2. Where tenant for life dies in possession, the reversioner or remainderman is not entitled to the occupation of the lands on which a crop is growing until that crop is taken off, or a reasonable time is given for taking it off; and the law is the same where the lands are leased for years to an under tenant. *Ib.*
3. If tenant for years occupies the premises after the emblements are taken off, the remainderman is entitled to recover for the use and occupation. *Ib.*
4. B, the husband of A, by a parol agreement in the fall of 1810, leased her lands to C for the year 1811, and C gave his bond to B for the rent, payable in August '811, which bond B assigned to W, and in August 1811, the bond was paid by C. In April 1811 B died. Part of the land was seeded in wheat in the fall of 1810, and the residue was woodland. A brought an action against C for use and occupation, from April 1811 to the end of that year—*Held*, that A was not entitled to recover for the value of the land used and occupied by C from April 1811; that C was entitled to the wheat growing, and had a right to enter for the purpose of securing the same; and for the time the wheat was growing, and until it was secured and taken off, he was not liable to pay for the use and occupation of the land on which it was

growing. That the parol lease of B determined with his death, and C, as his tenant, had no right to possess the demised premises, except to preserve the crop; and if he occupied them, or any part of them, for any other purpose, he was liable to A for the use and occupation thereof. *Ib.*

See Use & Occupation.

—— Waste 1, 2.

TENANTS IN COMMON.

See Court of Chancery 3.

—— Devise 5.

—— Legacy & Legatee.

TERRE-TENANT.

See Evidence 20.

TESTAMENTARY BOND.

1. In an action on the testamentary bond given to the state by the executor of L, brought in the name of the state at the instance of the administrator of J, and the six children (by name) of G, legatees under the will of L, it was objected, that under the pleadings and issues in the cause, the state could not recover, unless proof was produced that all the persons, for whose use the suit was brought, were alive at the trial—*Held*, that on the issues the jury could not find that any of those persons were dead, unless some proof of the death was produced to them, and that in the absence of such proof, the legal inference was that the persons were alive. *Maddox v The State use Swann, et al.* 539

2. —— The court refused to direct the jury, that if they should not find that G left six children, than then they should find for the defendant; but directed them, that if G left six children at the death of L, the estate must, under the residuary clause in the will bequeathing to J, and the children of G, be divided into seven equal parts; if G left only five children, then into six equal parts. *Ib.*

3. A joint action may be maintained in the name of the state on a testamentary bond, at the instance of persons claiming under rights, as legatees under the testator's will, as where one of the legatees had since died, his executor or administrator may be joined with the other legatees. *Ib.*

See Administration Bond.

TOBACCO.

See Costs 1.

TRANSITU.

See Stoppage in Transitu.

TRESPASS.

1. The plaintiff in an action of trespass *q. c. f.* having had upwards of 20 years possession by enclosures of what he supposed to be lot No. 7, on which the trespass was charged to have been committed, cannot support his action for a trespass committed within such enclosures, if not on lot No. 7. *Carroll et ux. v Smith*, 130

See Evidence 23.

TROVER.

1. In trover for a bond stated in the declaration to have been executed by H C and A G to the plaintiff—*Held*, that it was competent for the plaintiff to prove, by one of the obligors in the bond, its execution, without producing the bond, if it was in the defendant's possession; and that it was not necessary to give any other notice for the production of the bond, than what was given by the declaration in the action. *Smith v Robertson's Ex'r.* 30

2. In an action of trover brought by an administrator for the conversion of certain negro slaves, the declaration stated that J F, the intestate, died possessed of a negro woman named *Dinah*, in 1765; that *Dinah*, and her issue, came to the possession of the defendant, and that administration was granted to the plaintiff on the estate of J F in 1812. The county court directed the jury, that from the facts and circumstances given in evidence, if found to be true, they might and ought to presume, that if *Dinah* ever was the property of J F, she was legally transferred to the defendant, or those under whom he claimed. On appeal—*Held*, that the facts proved on the part of the plaintiff were sufficient to account for the delay which took place before the issuing the letters of administration to the plaintiff, and do repel the presumption that *Dinah* was legally transferred to the defendant, or those under whom he claims. *Fishwick's Adm'r. v Sewell*, 393

3 —— No right of action vested in any person to sustain an action of trover for *Dinah*, and her descendants, before letters of administration were granted to the plaintiff. The act of limitations could not begin to operate before such letters were taken out, and the act of limitations did not at-

tach until the demand and refusal. *Ib.* 399

4 —— The plaintiff is entitled to recover damages to the amount of the value of *Dinah*, and her descendants, together with damages for the detention, from the time of the demand and refusal proved. *Ib.* 403

5. —— A claim against the estate of J F, paid by R D, cannot be recouped from the damages for the conversion of the slaves claimed by the plaintiff. *Ib.* 404

See Evidence 21.

TRUST & TRUSTEE.

1. Where a sale of lands was made by a trustee appointed by a decree of the court of chancery, directing him, on payment of the purchase money, to convey to the purchaser and his heirs, the land sold, and the purchaser died without having obtained a conveyance from the trustee, who made a conveyance to the heirs of the purchaser—*Held*, in an action of ejectment to recover the lands, that the conveyance might be read in evidence. *Massey v Massey*, 141

2. A sale made by a trustee appointed by will, set aside on the ground of fraud. *Smith et al. v Baldwin, et al.* 331

3. If a man purchases an estate, and pays the purchase money, but takes the deed in the name of another, a trust results by construction of law to himself; and if the nominal purchaser refuses to execute a declaration of trust, the payment of the consideration may be proved by parol as before the statute of frauds and perjuries. The payment of the money is the foundation of the trust. *Dorsey et al. v Clarke, et al.* 551

4. Where the evidence was that D informed the witness that he had bought a tract of land to benefit Y, and if Y would pay him the purchase money, with interest, he would convey the land to him—*Held*, that this evidence, if considered as proving an agreement between Y and D, could only operate to set up a trust on the foundation of a special contract between the parties; and that to permit such a conventional trust to be proved by parol, would subvert the statute of frauds and perjuries. *Ib.*

5. If a man employs an agent, by parol, to buy an estate, who buys it accordingly, and no part of the consideration is paid by the principal, and there is no written agreement between the parties, he cannot compel the agent to convey the estate to him. *Ib.*

6. J S devised lands to his sons and daughters, in trust for his son W S, and he authorised them to sell the lands, and purchase other lands for W S; and if W S died without issue, he devised the lands to the said trustees. Certain of the trustees, one of whom was a *feme covert*, sold and conveyed the lands to J W, in which conveyance W S was a party grantor. On the death of W S, intestate and without issue, the heir of one of the trustees brought an ejectment against J W for his undivided part, &c.—*Held*, that he was not entitled to recover. *Selby's Lessee v Wilkes*, 242

7. A trustee cannot be a purchaser at his own sale. *Singstack's Ex'rs. v Harding*, 186

See Conveyance 2.
—— Court of Chancery 9, 23, 28.
—— Executors & Administrators 4.
—— Limitation of Actions 7.

U.

UNDER TENANT.

See Tenant for Life & Years 1, 2.

UNDUE PREFERENCE.

See Insolvent Debtor 1, 2.

UNLAWFUL TRADE.

See Assumpsit 1, 4, 5.

UNLIQUIDATED DAMAGES.

See Set Off.

USE & OCCUPATION.

1. Where D took a lease of a house from P for one year, on the same terms it had been let by P to J S, the former tenant, the rent to be paid quarterly, and D had then the possession of the house under J S. and that possession was continued under the contract between P and D—*Held*, that D became liable to an action for use and occupation, and his liability to that action could not be divested or defeated by his abandoning or relinquishing the possession, or underletting to another, and that liability continued during the term. *Adreon v Hawkins*, 319

See Rent 3.
—— Tenant for Life & Years 3, 4.

USURY.

1. A *qui tam* action was brought, under the act of 1704, *ch.* 69 against usury, for $450 debt. The declaration contained two counts, each demanding $450, on a corrupt agreement for a loan of $150 from the 2d of September 1805, to the 5th of October 1805, for which the lender was to receive $90; and for securing the payment thereof, the borrower gave his promissory note to the lender for $240, payable in 30 days. Verdict, (on *nil debet* pleaded,) that the defendant owed the said sum of $450, and a judgment rendered thereon for $450 debt, and $900 damages and costs; to be released on payment of $450, with interest, &c. On appeal the judgment was *reversed*. *Boehme v Aisquith, qui tam*, 207
2. Whether a *qui tam* action will lie where the usurious loan is for a less time than *one whole year? Quere. Ib.*
3. Whether the judgment to be entered on a verdict in a *qui tam* action is embraced by the act of 1809, *ch* 153, s. 4, for the amendment of judicial proceedings? *Quere. Ib.*
4. If a promissory note was drawn to borrow money at illegal interest, and the holder obtains money on it on a usurious consideration, the note is, under any circumstances void. But if the note was *bona fide* in its origin, an innocent holder without notice may recover on it, though it may have been subsequently passed upon a usurious consideration. *Burt v Gwinn*, 507
5. Whether a promissory note drawn to borrow money is usurious and void in its inception, because money has been obtained on it by the holder, on a usurious consideration, although the drawer, at the making the note, had no knowledge that such a use was to be made of it? *Quere. Ib.*

See Evidence 27.
—— Promissory Note 2, 3.

V.

VARIANCE.

See Assumpsit 6.
—— Location of Lands 1.

VARIATION.

See Grant 2, 3, 4.

VENDOR & VENDEE.

See Court of Chancery 24, 25.

VERBAL CONTRACT.

See Rent 2.

VERBAL GIFT.

See Gift 1.

VERDICT.

1. Where the verdict in an action of ejectment was general against the defendant, for all the land for which he took defence on the plots, and the judgment was entered by lines described on the plots, which included more land than the defendant took defence for. On appeal the judgment was affirmed. *Easton v Snavely's Lessee*, 17
2. Where the verdict for the plaintiff in an action of ejectment was for certain lands as mentioned and included in certain conveyances, set forth in the verdict, and judgment was rendered thereon for the plaintiff. *Massey v Massey*, 144

See Issues.
—— Usury 1, 3.

VERIFICATION.

See Pleading.

VOID DEVISE & LEGACY.

See Court of Chancery 18.
—— Legacy & Legatee.

VOLUNTARY CONVEYANCE.

See Court of Chancery 8.

VOLUNTARY WASTE.

See Waste.

W.

WAGER.

1. A speculating contract as to the price of stock is not a wager inconsistent with the policy of the law, and therefore not void under the act of 1813, *ch.* 84. See Assumpsit 6, and *Ridgely v Riggs*, 358

WAIVER.

See Promissory Note 7.

WARRANT.

See Attachment 3.

WARRANTY.

1. A sale of an unsound slave, known to be so by the seller, and concealed from the purchaser—*Held* to be fraudulent, and the purchase money recovered back. *Duvall v Medtart*, 14

2. In an action on the case on a warranty by D, that certain slaves sold to P were sound and healthy, knowing them to be unsound, &c. the evidence was, that when the slaves were about to be delivered, the agent of P said to D, do you deliver those slaves as sound? He answered, I know nothing of them; I refer you to S; I got them from him; I did not know any thing about them till now; he will deliver them. The same question was asked of S, who answered that they were sound to the best of his knowledge. The slaves were then delivered by S to the agent; and at the time of the delivery one of the slaves was unsound. P offered to give in evidence the declarations of S, made sometime before the sale to P, for the purpose of proving that he knew the slaves to be unsound before and at the time of their delivery—*Held*, that the evidence was inadmissible—*Held* also, that the circumstance of the mother of the slaves having died with the king's evil, or scrophula, was not of itself sufficient evidence of the unsoundness of any of her children to entitle P to recover. *Chilton v Jones*, 63, 64.

3. — The declaration in the above action, in the *first* count, stated that D, by his bill obligatory, obliged himself to pay to P £380, the amount to be paid off in slaves to be valued, &c. That D, in discharge of the bill, delivered certain slaves, and they were valued, which slaves D undertook and promised P that they were sound and healthy; in consideration thereof P delivered up the bill obligatory—averment, that the slaves were not sound and healthy, and that D knew them not to be so, but falsely, &c. to deceive P, did not regard his promises, by reason whereof the slaves were of no use and value to P. The *second* count was on a warranty that certain slaves sold, &c. were sound and healthy, knowing them to be unsound and unhealthy, &c. No damages were laid in the declaration. —*Held*, that on the evidence above stated, P was not entitled to recover on his declaration. *Ib.*

WASTE.

1. A lessee for life or years, without special covenants, is responsible to his lessor for all injuries amounting to waste, done to the premises during his term, by whomsoever those injuries may have been done, with the exceptions of the acts of God, public enemies of the country, and the acts of the lessor himself. *White v Wagner*, 373

2. An action on the case in the nature of waste will lie for waste committed by a tenant for years. And it seems it will lie for permissive waste; and that it is not necessary to declare as for permissive waste. *Ib.*

3. The distinction between voluntary and permissive waste. *Ib.*

See Evidence 40.

WHOLE BLOOD.

See Descents 3.

WIDOW.

1. F T C, by his will dated in 1817 bequeathed the whole of his personal estate away from his wife, but devised to her a part of his real estate, and died leaving no child or descendant. His widow renounced the will—*Held*, that she was entitled to one half of his personal estate, after the payment of his debts. *Coomes et al. v Clements*, 480

WILL.

1. A will executed in 1804, devising real and personal estate, was decreed by the orphans court to have been impliedly revoked, and they refused to admit it to probate. On appeal to the court of chancery, the decree of the orphans court was affirmed. In an action of ejectment to recover the lands devised by the will, it was offered in evidence by the plaintiff—*Held*, that the decision of the orphans court, and the court of chancery, was not conclusive, and that the plaintiff might prove the execution of the will. *Massey v Massey*, 145

2. Parol evidence is not admissible to prove that a testator had frequently declared, and on the day before his death, and sometime after the execution of a paper purporting to be his last will, that he had made a will, and believed he had destroyed it; that as he could not find it, he supposed he must have destroyed it, but was uneasy about it, as he intended and wished to alter it, and requested the witnesses to go to his house for that purpose. *Ib.*

3. H M, being a married man, made his will in May 1804, after which he had two children born, one in January 1805, and the other in June 1807. In July 1804 he acquired by purchase 399 acres of land, and in August 1805, he acquired in like manner 76 acres of land, of which he

died seized—*Held*, that the will was in force, and as such admissible in evidence. *Ib.*

4. A paper, purporting to be the last will and testament of D S, wholly in his own handwriting, and having his name written at the beginning, devising and bequeathing both real and personal estate to his brothers, nephews and nieces, &c. leaving blanks for their names, and appointing by names, his two brothers and a nephew his executors, leaving also the day, month and year, in blank, with a formal seal affixed, and having the form of an attestation used to wills devising real estate, with three crosses opposite to where witnesses are accustomed to sign their names, was found, after the death of D S, in an envelope of white paper, being a half sheet of letter paper, having thereon written at the top, in the handwriting of D S, words corresponding with the concluding words of the will, and which appeared to be a small part of the draft from which the said will was copied, deposited at the bottom of a bundle of certificates of bank stock to a large amount, in a locked trunk, a place of great security, and contained a considerable sum of money, besides many valuable papers, and none but papers of importance. It was proved that D S had always been a man of intelligence and information, and well acquainted with the manner and form of making wills, and also well acquainted with the names of his brothers and sisters, and his nephews and nieces, and all his family and connexions. That in recent conversations with his intimate acquaintances, he said that he was prepared with a will, and had made it a point always to have a will by him. Bank stock had been purchased for him, by his directions, but had not been transferred to him, and it was not mentioned in the will, nor was there any general residuary clause therein by which that stock would pass. The orphans court decreed, that the paper be admitted to probate as the last will and testament of D S, as to his personal estate—On appeal the decree was *reversed*. *Tilghman et al. v Steuart, et al.* 156

See Limitation of Actions 3.

WITNESS.

1. A witness is bound to answer a question touching the issue in an action at law, in which he is not a party, although it may establish, or tend to establish, that he owes a debt, or otherwise may subject him to a civil suit, or a bill in chancery. *Taney v Kemp*, 348

2. A witness is not obliged to answer questions which may subject him to a criminal prosecution, or to a penalty or forfeiture. *Ib.*

See Co-Defendant.
—— Court of Chancery 12, 20.
—— Ejectment 2.
—— Evidence 2, 16, 31.
—— Location of Lands 2.
—— Non Est Factum.
—— Promissory Note 1, 3.
—— Subscribing Witness.
—— Trover 1.

WRIT OF ERROR.

1. A judgment in ejectment was entered for the plaintiff at September term 1807, with an agreement that execution should not issue thereon before the decision of the court of appeals in the case of D against P, and if that judgment was reversed, then the above judgment was to be struck out. On this judgment the defendant brought a writ of error on the 3d of July 1811, and the judgment referred to was *affirmed* in the court of appeals at December term 1813—*Held*, that the writ of error be *quashed*, it having been sued out after three years had elapsed from the time of the rendition of the judgment. *Dorsey v Dorsey's Lessee*, 215

END OF THE FOURTH VOLUME.

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